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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 317

OCTOBER TERM, 1966.

NORTHERN ILLINOIS GAS COMPANY, a Corporation,
Plaintiff-Respondent,

vs.

JOHANNAH H. WIENRANK, DONALD R. WIENRANK, ANNABELL WIENRANK, CLARA CANADY, HERBERT E. MYERS, GOLDIE H. CENTER, WENDELL F. CENTER, CHRISTINE LIETZ, EDWARD LIETZ, MATHILDA ASH, JOHN J. ASH, JOHN C. WIENRANK, ELSIE WIENRANK, JOHN ASH, JERRY ASH, DONALD R. WIENRANK as Executor of the Estate of Christ J. Wienrank, Deceased,
Defendants-Petitioners.

PETITION FOR WRIT OF CERTIORARI

To the Appellate Court of Illinois.

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PETITION FOR WRIT OF CERTIORARI

To the Appellate Court of Illinois.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, Third District, reported in 66 Ill. App. 2d 60, 213 N. E. 2d 411. A copy of the judgment orders entered in the trial court, and of the Appellate Court's opinion appear in the Appendix to this brief, together with the relevant excerpts from the *Buckles, Mason,* and *Canady* decisions upon which the present opinion rests.

GROUNDS ON WHICH JURISDICTION IS INVOKED.

The judgments which took the property of the defendants without due process of law were entered by the Circuit Court of Kankakee County upon November 15, 1963. The opinion of the Appellate Court was rendered December 22, 1965, rehearing denied February 3, 1966, and leave to appeal denied by the Illinois Supreme Court upon May 19, 1966.

Jurisdiction is invoked under Title 28, *United States Code*, § 1257 (3). The actions of the Illinois trial court, affirmed by its reviewing courts, clearly deprived the defendants of property without due process of law, in violation of the Fifth and Fourteenth Amendments. The actions taken also are squarely repugnant to Grand River Dam Authority v. Grand-Hydro, 335 U. S. 359, at 367-369.

QUESTIONS PRESENTED FOR REVIEW.

1. Was the rejection by the trial court of all testimony as to fair cash market value of the gas storage rights in these lands—on the basis that no other person or company could bid against the plaintiff which had been granted a certificate of convenience and necessity—a taking of property without due process of law?

2. Has this Court tacitly overruled Grand River Dam Authority v. Grand-Hydro, 335 U. S. 359, and Cooper v. Aaron, 358 U. S. 1, by its refusal to review People v. Buckles, 24 Ill. 2d 520, 182 N. E. 2d 169, cert. den. 371 U. S. 185, and Midwest Gas Transmission Company v. Mason, 31 Ill. 2d 340, 201 N. E. 2d 379, cert. den. 380 U. S. 124?

3. Was the rejection by the trial court of all testimony relating to the reasonable use of these individual tracts for gas storage, the reasonable combination of such tracts

into a unified competitive storage field, the reasonable possibility of increasing revenue returns of these lands by irrigation from St. Peter water reserves (of which they are now deprived), the danger of destruction of present water resources by gas injection, and the devaluation of these lands by reasonable fears of fires and explosions, a deprivation of defendants' constitutional rights?

CONSTITUTIONAL AND STATUTORY QUESTIONS.

Involved in the consideration of this case are the Fifth and Fourteenth Amendments, as follows:

Fifth Amendment

"No person shall * * * be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment

"Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The question is of great public importance, since it will arise in almost every situation where a quasi-public corporation exercises the power of eminent domain under a certificate of authority from a State. If, by the issuance of such certificate, the existence of a competitive market is destroyed, and a jury is thus not permitted to consider what others would pay for the rights taken, the right to jury trial upon the question of valuation is—for all practical purposes—eliminated.

STATEMENT OF THE CASE.

The plaintiff called three witnesses as to value. Each of them stated that the highest and best use of the defendants' lands was for farming; that the taking would diminish the value by $25 an acre; that there would be no damage to the remainder. Defense counsel were not permitted to cross-examine as to the fair cash market value of the gas storage rights being taken—which included the exclusive use for such purpose of all strata below the Maquoketa formation (Abst. 76, 82, 88, 93, 94, 96, 97, 106). Defense counsel also were not permitted to cross-examine as to the value of possible irrigation uses of the land nor as to the diminution in value caused by reasonable fears of purchasers of fires, explosions, or destruction of existing water wells—which catastrophies had occurred in the nearby gas storage fields of Herscher and Mahomet. The trial court based its rulings upon the Buckles case, 24 Ill. 2d 520, 182 N. E. 2d 169.

The valuation experts of the defendants likewise were not permitted to consider any of the above factors. The jury assessed a loss per acre of $75.

The testimony which was wholly excluded by the trial court falls into several distinct categories which overlap in part. They concern the following: 1. The existence of a competitive market for the gas storage rights here acquired by the plaintiff, and the values of such rights in that market, or, alternatively stated, the lessening in value of those lands when these rights are taken; 2. The possible use of such tracts independently, or in combination, for gas storage; 3. The potentiality of escape of stored gas, and its effect upon present water resources, and upon market values because of reasonable fears of damage to existing wells and the danger of fires and explosions; 4. The potentiality of irrigation of these lands by using

water from the aquifers being taken—and the necessity of such water resources for that purpose.

Testimony in all of these areas was excluded by the trial court. The jury was not permitted to hear any testimony upon any of these subjects in arriving at the value of the property rights taken. Each of those areas was covered by proper offers of proof by defense counsel. To aid this Court, we will break the evidence offered down into sections and indicate the qualifications of each witness. We say that the trial court's exclusion of all such testimony prevented a full and fair hearing and deprived the defendants of property without due process. References are to the printed Abstract filed in this cause.

Fair Cash Market Value of Gas Storage Rights.

The Davis offer of proof (Abst. 106-112) was that Orville C. Davis is a graduate engineer who was and is in charge of the underground gas storage projects both at Herscher and at Mahomet (Abst. 106-112). There are twenty customer companies at Herscher, many of whom are not satisfied with the amount of gas which they are able to acquire from that source and who are actively seeking other aquifer gas storage facilities in that immediate geographical area.

From his knowledge of pipeline companies and utility companies which operate in this field, the witness would testify that there is substantial competition for gas storage aquifers and there would be spirited competitive bidding between such companies for any suitable gas storage aquifer in that area of Illinois. The position of the trial court is shown by the following rulings as to this offer of testimony (Abst. 107, 111, 112):

> "Mr. Appleman: I offer to prove by the witness that from his knowledge of pipeline companies and utility companies which operate in this field and

which are customers of Natural Gas Storage Company, and which he knows from his acquaintance with numerous utility companies and gas storage companies as well as pipe line companies, that there is substantial competition for gas storage aquifers—that as a matter of fact there was a legal battle over the Mahomet project between Northern Illinois Gas Company and People's Gas Company and that there would be substantial competitive bidding between such companies for any suitable gas storage aquifer in this area of Illinois.

"The Court: Let me state the Court's position. The Illinois Commerce Commission decided who shall and shall not conduct certain public utility searches. They issued a Certificate of Convenience and they gave permits and they do that after extended hearings of all the pertinent evidence and evaluating it. It makes no difference whether Peoples Gas, the Public Service Company, or one hundred other companies are interested in the project. The Illinois Commerce Commission has permitted the Northern Illinois Gas to do so. That is one of the natures of the public utility business—that it isn't competitive after the permit is given.

"Mr. Appleman: Even though only one can physically bid for it, then they must pay what every company would pay if it was a public market.

"The Court: I understand the position but I can't take the same position under the case as I see it."

Allen Van Wyck (Abst. 113) was tendered as president of Illinois Power Company. The offer was that his company is in need of additional underground gas storage and is engaged in discovery operations to secure additional gas storage fields. His company would be interested in bidding for an aquifer in that area if available for purchase.

The offer as to Dr. Carl A. Bays (Abst. 153-164) brought out that he is a geologist who has worked on many underground gas storage projects, including Herscher and Laclede (St. Louis), and was familiar with those remaining projects on which he had not worked. He knew the prices paid for purchase and for rental of substantially similar aquifers, where competitive conditions prevailed. Some such purchases had been made where no eminent domain statute existed so that private negotiation determined the price. In the Brandywine project, and at St. Louis, the going price, in some instances, went as high as $600 to $700 per acre for gas storage rights (Abst. 156). On a rental basis, in Illinois at Cooks' Mills, the price paid would be equivalent to $50 per acre per year based on the projected use capacity at Crescent City (Abst. 157). The revenue derivable from use of the St. Peter on a single cycle basis would run from a minimum of $400 to a maximum of $1700 per acre per year.

The offer of proof as to Harold Sense (Abst. 167-174, 196-202) was that the witness had been a realtor for twenty-one years and was familiar with each of the tracts in question; that he had done a great deal of appraisal work for governmental and public bodies; that he was familiar with all the uses to which these properties were adapted; that they were adapted to and suitable for underground gas storage; that there exists to the knowledge of such witness a competitive market for such gas storage aquifers of this type and in this locality; that he has made a study of the prices paid for voluntary acquisitions of gas storage reservoirs possessing similar characteristics and similarly located geographically; and had an opinion as to the difference in value before and after the taking proposed in this case; that the difference in the value of the Canady land as a result of such taking would be $1200 an acre; that the John Ash property would be worth $1675 an acre before and $350 an acre

after such taking; that the Wienrank property would be worth $1785 an acre immediately before such taking and $460 an acre immediately after such taking, and as a result thereof; that the Center property was worth $1700 an acre immediately before such taking and $375 an acre immediately after such taking.

The offer of proof as to Ellsworth Warmbir (Abst. 178-182, 209) showed that he was a realtor of over fifteen years experience; that he was familiar with the property involved in the case and was aware of the use which plaintiff proposed to make of the said property and the rights which it sought to acquire; that he was also familiar with the Herscher field; that he had an opinion as to the difference in value immediately before and immediately after the taking as to each of the tracts in question, and in his opinion the value of the Canady tract was $1750 an acre immediately before and $300 an acre immediately after such taking; the Wienrank property a value of $1760 an acre immediately before and $310 an acre immediately after such taking; the Center property a value of $1710 an acre immediately before and $260 an acre immediately after such taking; and the Ash property a value of $1685 an acre immediately before and $235 an acre immediately after such taking.

The offer of proof as to Sylvester J. Beaupre (Abst. 204-209) was that he had been a realtor for thirteen years and had made numerous appraisals for governmental bodies, insurance companies, and individuals; that he had been upon each of these properties and examined them; that he was aware of the nature of the rights proposed to be taken; that he was familiar with all the uses for which the said properties were adapted; that the said properties were adapted to and suitable for underground gas storage; that such usage was one of which the properties were presently capable without interference with the use of the

surface for agricultural or residential purposes; that there existed to the knowledge of such witness a competitive market for gas storage aquifers of this type and in that locality; that the difference in value immediately before and immediately after such taking, and as a result thereof, would be, in the expert opinion of the witness, as follows: Canady, $1730 an acre before—$265 after; Wienrank, $1825 an acre before—$350 after; Center, $1700 an acre before—$225 after; Ash, $1690 an acre before—$215 after.

Offers of proof were also made by plaintiff's witness Speckman (Abst. 82) as to the need for such gas storage aquifers in that area and the existence of a competitive market relative thereto. The jury was not permitted to hear any of such proffered testimony and objections were sustained to all offers of proof on the basis of *Buckles* as above stated (Abst. 107, 111, 112).

The Use of Such Tracts Independently, or in Combination, for Gas Storage.

The offer as to Dr. Carl A. Sherman (Abst. 112, 113) was to the effect that such witness was head of the Petroleum Engineering Section of the Illinois State Geological Survey. He is familiar with subsurface projects wholly dependent upon groups of landowners joining voluntarily together. These projects in Illinois have been successful. In one year alone, various of such projects totalled approximately 140,000 acres—one of them embracing 7,800 acres.

The offer as to Dr. Carl A. Bays (Abst. 162, 163) was that individual land tracts of 100 acres or more could be used independently for gas storage either by cavity storage or by a water confining technique with which he was familiar, known as the Edholm container, in which the gases are prevented from escaping by being surrounded

with water under higher pressures. The offer included the fact that defendants' properties could be used separately or be voluntarily combined or unitized for gas storage, and that unitization had been used successfully in Illinois in many projects involving geological interests—one of which, in the Salem area, embraced 418 separate tracts and nearly 6,000 individual signatories. Eminent domain was not available nor used in those instances.

Again, objections were sustained to all such offers of proof and the jury was not permitted to hear any of such testimony.

Escape of Stored Gas and Effect Upon Value.

The offer of proof as to Dr. Alfred H. Bell, of the Illinois State Geological Survey (Abst. 145), was to the effect that in every instance of gas injected beneath the surface in Illinois where the Maquoketa was relied upon (as here) as a caprock, gas had escaped and migrated to the surface. The offer as to Dr. Carl A. Bays as to this matter (Abst. 163, 164) was that there had been a number of known escapes of stored gas within a radius of 300 miles of the area in question which would affect the market value. At Mahomet, there were both surface blowouts and explosions, and gas escaping into wells had completely spoiled the water resources for two farms, after which the projected St. Peter storage was abandoned. At St. Louis, stored gas escaped but did not catch fire—causing a large number of homes to be evacuated and the St. Louis Airport to be closed down for 55 hours. Leakage at Herscher, 17 miles from the project in question, began shortly after gas was injected and has continued. Such gases are inflammable. In Dr. Bays' opinion, based upon a reasonable degree of scientific certainty, these factors will greatly affect the willingness to purchase on the part of any party to a real estate sale where there was exposure to such condition.

The Orville C. Davis offer of proof (Abst. 106-111) also included the fact that such witness was in charge of both the Herscher and Mahomet projects; that the formations in the Crescent City area (involved in the instant case) are substantially the same as at Herscher and Mahomet so far as the aquifers and caprock are concerned; that as soon as gas was injected at Herscher under high compression, leakage appeared in the village wells and in approximately 33 farm or private wells; that such leakage also appeared in the basements of houses in the Herscher area; that the water supplies for approximately twenty farms were affected to the point that the storage company has had to supply those twenty farms with water from the village; that efforts to stop such leakage had been unsuccessful; that a fire occurred at Herscher, Exhibits 7-18 refused, one photograph of which is included (Abst. 185), which required some 76 asbestos-clad firemen to bring the fire under control; that at Mahomet, when gas was injected into the St. Peter formation, such gas escaped at two places, one of which was a mile and a half from the injection well; that there was a blowout which caused dirt to blow between 75 and 150 feet in the air which continued for approximately twenty minutes; that at another point in that project gas escaped and exploded, causing a fire to occur as shown by Exhibits 1-6, refused, one of which photographs is included (Abst. 183); that the witness personally observed these things and that the photographs correctly portray such occurrences.

The Dr. J. Harlin Bretz offer of proof (Abst. 116-120) was to the effect that he had taught geology for many years at the University of Chicago and had published many books and articles in geology, plus contributions to the Encyclopedia Britannica. He stated that the Crescent City dome is contemporaneous with Herscher. In his judgment, there are thousands of joints and cracks in the overlying caprock at Crescent City, and in his judgment

gas injected into the St. Peter formation will leak upward to the surface. As consulting geologist in the Herscher project, he had observed the escape of gas into the village well and thirty-three farm wells, and the escape of gas into the basements of the houses in towns and on farms. In his opinion, the same events will occur at Crescent City. In studying other gas storage projects, with similar characteristics, he had found like escapes of gas with resulting fires and explosions.

Other offers of proof by the defense to like effect as to such fires and explosions were also excluded. These included the petitioners' own witness, Dr. Paul Witherspoon (Abst. 69); Bruce Janes (Abst. 151); and Leland Nelson (Abst. 152) who were eyewitnesses to the fires and explosions at Herscher and Mahomet. Similarly, objections were sustained as to offers of proof of the destruction of existing water supplies in the shallow glacial drift wells at Herscher by escaping gas by witnesses Arthur Berger (Abst. 151), F. H. Kruse (Abst. 147), and Roy Wilcox (Abst. 148). Similarly, the trial court rejected offers of proof by real estate experts to the effect that the reasonable potentiality of such escaping gas would affect the price which a willing purchaser would pay for defendants' lands following such taking, and their opinions as to the amount of such decrease in value (Abst. 174, 182, 199, 200). The court also excluded the offered photographs of the Mahomet and Herscher explosions (Abst. 110, 111, 151, 152, 176, 183, 185) and an offer of proof of testimony of plaintiff's vice-president that, even in the event of such leakage of gas to the surface, such company would not cease that operation (Abst. 189).

The Bretz and Bays offers of proof also included opinions that existing shallow water wells of the defendants would be contaminated or destroyed by gas escaping from underground storage pursuant to this project. All offers were rejected.

Irrigation.

The offer of proof as to Harmon F. Smith (Abst. 124-127) was to the effect that he is the hydrologist of the Illinois State Water Survey; that his work deals with water resources in the state of Illinois; that he has all information relative to ground water resources under his supervision and that the publications of the State bulletins relative thereto have been prepared under his direction; that he is familiar with the glacial drift water supplies in the Crescent City area from which defendants' present wells derive their water; that, based on his knowledge in this field and of this area, he has an opinion based upon a reasonable degree of scientific certainty as to the adequacy of the glacial drift water supplies to support irrigation; that his opinion is that such supplies are inadequate to provide defendants' farms with water for irrigation and that the supplies would become inadequate within a period of two years if so used. Such offer was rejected, although the court permitted the plaintiff, on rebuttal, to present testimony of a Dr. George Maxey, of Reno, Nevada, formerly with the Illinois Geological Survey, including an opinion that shallow wells would support irrigation (Abst. 211-213). A renewal of the Harmon Smith and other offers was then made but again rejected (Abst. 213).

The relevant portion of the offer of proof of Dr. Carl A. Bays on this matter (Abst. 153, 158-160) is to the effect that he holds a doctorate in geology from the University of Wisconsin and served for three years as head of the Division of Ground Water Geology of the Illinois State Geological Survey; that he is familiar with the water resources in the St. Peter formation at Crescent City; that such resources will be completely displaced and made unavailable by gas injection; that the St. Peter formation is presently completely filled with water which is suitable

for personal consumption and for irrigation; that his engineering firm has done a great deal of work upon irrigation and that the supplies available through the St. Peter formation would support irrigation indefinitely; that it requires approximately 300,000 to a half million gallons of water per day to irrigate a 160 acre field—approximately the same as that required by a town of 10,000 people; that irrigation of lands in the Crescent City area could not be performed from the glacial drift because they would be depleted in the process.

William Hoekstra, from St. Anne, testified (Abst. 127) that he has been engaged in vegetable and grain farming for about 35 years and has irrigated for about 25 years. He farms 1400 acres of land, raising cabbage, cantaloupe, potatoes, sweet corn, field corn, and soybeans. He has studied other irrigated areas, ranging in size up to as much as 4000 acres. He has studied irrigated sod farms in the area and other types of irrigated farms, observing their contours, soil types, irrigation methods, and results. He has read extensively in the field and discussed the problems with experts.

Mr. Hoekstra testified that he had visited all of the lands here being condemned, observed the sandy loam which comprises their soil, and observed their slopes. He had an opinion, based upon his background and experience as to their suitability for irrigation. His opinion was that each of the tracts under consideration is suitable for farm irrigation and that the current yield per acre could be increased to approximately $300 a year. The cost of pipe would be paid for out of one or, at the most, two years' results. The gross yield of land may be increased as much as six times by irrigation. Irrigation removes dependence on the weather, permits the capture of premium prices by earlier marketing, and permits the raising of high value crops.

Offers from local history works, published from 1880 to 1900, were made (Abst. 131) to show that at such time both Iroquois and Crescent Townships were blessed with an abundance of artesian and flowing wells. An offer was made of an official state publication (Abst. 212) to show that the water level in northeastern Illinois was dropping at the rate of 4 to 7 feet a year. All the preceding offers were rejected.

Dwayne Cultra (Abst. 123) testified that he operates the Onarga Nurseries in Iroquois County and irrigates acreage used in farming as well as nursery stock. Such irrigation equipment of both Onarga Nurseries and Bork Nurseries is above ground and plainly visible to the sight, so that anyone in that area could see it (Abst. 124) —Mr. Bradshaw, of Onarga, having testified for plaintiff that there was no irrigation by either of those enterprises (Abst. 96).

It was shown by the defendants that well permits had been issued by the State to two of the defendants—John Ash (Abst. 176, 178) and Donald Wienrank (Abst. 194, 196) to drill water wells to the St. Peter formation for the purpose of irrigation, which drilling had not been done because of the pendency of this litigation.

FEDERAL QUESTIONS PRESENTED.

Prior to commencement of the jury trial in the Circuit Court, the defendants filed a brief pointing out the constitutional questions presented under the Fifth and Fourteenth Amendments if a jury should not be permitted to consider testimony as to the fair cash market value of such property for all consistent, concurrent uses and the diminution in value caused by such taking and by the proposed use. The trial court at that time stated that he felt bound by the *Buckles* decision, which defendants claimed was unconstitutional if construed to make the issuance of a certificate to one utility company a compe-

tent means of destroying the tests of "fair cash market value".

These same points were constantly reasserted by the defendants throughout the trial by offers of proof, as heretofore shown (e. g., Abst. 107), by their motion to strike the testimony of plaintiff's witnesses (Abst. 36):

> "[T]he ruling of this Court deprives the defendants of property without due process of law in violation * * * of the Fifth Amendment and Fourteenth Amendment to the Constitution of the United States";

by their motion to dismiss the proceedings (Abst. 39):

> "That each and all of the said matters * * * have resulted in depriving the defendants of property without due process of law, in violation of the Constitution of the United States, Fifth Amendment and Fourteenth Amendment * * *";

and by their post-trial motion (Abst. 49):

> "[T]he Court deprived the defendants of property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States * * *."

Because of the constitutional questions, our appeal was taken directly to the Supreme Court of Illinois, which, on its own motion, transferred the proceedings to the Appellate Court on the basis that the constitutional questions were no longer disputable in the light of *Buckles* (24 Ill. 2d 520). The Appellate Court, in its opinion, followed *Buckles*, and defendants' petition for leave to appeal to the Illinois Supreme Court was denied. Accordingly, the deprivation of property without due process has been consistently urged by the defendants from the inception of these proceedings, and is clearly presented here. The relevant portions of the supposedly controlling decisions of *Buckles*, *Mason*, and *Canady* are included in the Appendix.

ARGUMENT.

So far as the Bar in general is concerned, it feels that its contact with this Court is rather esoteric and remote. Statistics show that this Court accepts less than 5% of controversies involving private citizens in which questions of the greatest magnitude may be involved, while accepting over 80% of controversies proffered by the government. It has come to be, in lawyer-consideration, a "super-government tribunal."

This case does not involve the civil rights of negroes in a Southern state. However, it involves the clear deprivation of property rights of white farmers in a Northern state. And this deprivation is particularly flagrant because it flies directly in the face of Grand River Dam Authority v. Grand-Hydro, 335 U. S. 359 at 367-369, which decision was expressly called to the attention both of the trial court and of the reviewing courts of Illinois. Of course, that suit was a controversy between two utility companies. This Court refused to review two cases from Illinois involving the same legal question where it was only a private citizen protesting the taking without compensation of his property by a utility company. Those decisions were People v. Buckles, 24 Ill. 2d 520, 182 N. E. 2d 169, cert. den. 371 U. S. 185; Midwest Gas Transmission Company v. Mason, 31 Ill. 2d 340, 201 N. E. 2d 379, cert. den. 380 U. S. 124. In fact, this Court has never, it appears upon our research, entertained a suit to review the right of a utility company acting under state authority to take rights other than naked soil, or to make payment therefor.

Subsurface gas storage is becoming increasingly important in our economy. Millions of acres of subsurface strata are now or will shortly be utilized in this manner, constituting a major problem both to property owners

and to utility companies. Yet this Court has never accepted jurisdiction in such a controversy, so that this constitutes a question of first impression, except as heretofore announced by this Court in the *Grand-Hydro* case which Illinois refuses to follow. Utility companies pay millions to each other for such rights but almost nothing to the landowner. It is, frankly, time for this Court to recognize that there may be other controversies as important as the right to vote—that "property" is likewise protected by due process. Further, once this Court has announced that a state cannot, by issuing a certificate of convenience and necessity, restrict the market value of property to that amount which the certificate holder wants to pay, and preclude the landowner from offering testimony as to value, then this Court should not close its eyes to a flagrant disregard of such principle.

If the foregoing is rude, I apologize, but I will not retract one word of it. In some manner, in some tribunal, the rights of citizens must be protected. I have tried cases for over thirty years in the belief that jurists are not so gutless that they will blithely ignore abuses other than those currently attracting popular attention. I was shocked, frankly, when this Court refused to review *Buckles* and *Mason*—although I was not counsel presenting those controversies in this Court. It is not to be wondered that Illinois may consider that its unconstitutional approach has been tacitly approved, and that other states may be encouraged to consider that they, also, may endow utility companies with the right to take land, or rights in land, without payment.

Illinois has been singularly cavalier of the constitutional rights of individuals. For some decades, persons accused of criminal violations were imprisoned without representation by counsel or deprived of other rights.[1] Again,

[1] See the discussion in footnote 1 of White v. Ragen, 324 U. S. 760 at 762.

other constitutional rights were ignored for many years before this Court required Illinois to warn those accused of crime of their right to have counsel present when interrogated by public authorities, People v. Escobedo, 378 U. S. 478. Clearly, constitutional rights can be violated as flagrantly by a judicial body as by the action of a state legislator or police officer, Cooper v. Aaron, 358 U. S. 1 at 17:

> "Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the loss; whatever the agency of the State taking the action (citing cases); or whatever the guise in which it is taken (citing cases). In short, the constitutional rights * * * can neither be nullified openly and directly by state legislators or state executives or judicial officers * * *."

The trial court was consistent, even though wrong. As it stated (Abst. 107) in referring to the Buckles case: "the only thing I can go by is what the Illinois Supreme Court said"; and (Abst. 112): "[I]t isn't competitive after the permit is given."

It would seem that the matters set forth in the Statement of Facts would suffice to show a clear deprivation of property rights without the necessity of a recital of relevant decisions. We will keep the discussion as brief as possible consistent with the importance of the cause, and will not reiterate factual matters. It should be borne in mind, however, that since those were offers of proof, and there was no cross-examination upon them, they must be accepted as accurate.

It is obvious that the jury did not believe the valuation experts of the utility company—since it fixed the valuation of that taken at $75 per acre when each of those experts (of whom Lloyd Stryker said "Experts, bah—you buy

them like asparagus, by the bunch") parroted a figure of $25 per acre. And this was under circumstances when every true element of value and damages (*ante*, pp. 4-15) was excluded from its consideration. Obviously, had proper evidence been admitted, a verdict for the full measure of that taken and for the damages resulting would have been returned. Both the Fourteenth and Fifth Amendments are applicable to guarantee the defendants' rights, Olson v. United States, 292 U. S. 246 at 254; Martin v. Creasy, 360 U. S. 219 at 226.

The closest case to the legal situation here propounded is Grand River Dam Authority v. Grand-Hydro, 335 U. S. 359. There the plaintiff conservation district was created by Oklahoma law, possessing the power to develop and to sell electrical energy. The defendant was a public utility company, which had acquired the land for that purpose but had never applied for a license nor taken any steps in that direction. The trial court excluded evidence on the value to the owner for a dam site. This ruling the Supreme Court of Oklahoma held to be erroneous and reversed, stating among other things quoted in the United States Supreme Court opinion (pp. 367-8):

> "* * * it is not merely the value of the property for the use to which it has been applied by the owner that should be taken into consideration, but the possibility of its use for all purposes, present and prospective, for which it is adapted and to which it might in reason be applied, must be considered, and its value for the use to which men of prudence and wisdom and having adequate means would devote the property if owned by them must be taken as the ultimate test."

It was expressly contended in that case that the plaintiff had a permit and the defendant had none. This was held to be completely immaterial (p. 371). As to this particu-

lar point, the Oklahoma Supreme Court had stated in its opinion, 200 Okla. 157 at 160, 201 P. 2d 225 at 227-8 (quoted at p. 369 of the U. S. opinion):

> "The state cannot, through its law-making body, remove the principal value of private property and, through its established agency acquire the property by condemnation, fixing the reimbursement to the owner on the reduced value."

Interestingly enough, had it been the United States which was seeking to take the property, it would have had a right to do so without compensation by reason of the "navigable waters" rule. That, apparently, was where the Illinois Court in the Buckles case completely misread the law, since the only decision which it cited to substantiate its holding, United States v. Virginia Electric & Power Co., 365 U. S. 624, involved this precise point. That involved the erection of a dam and reservoir on the Roanoke River. The respondent had acquired a flowage easement over "fast lands" in 1907. The owner agreed to a one dollar settlement with the government, the respondent intervened, and the district court made a substantial award of damages which was affirmed by the Court of Appeals but vacated in 350 U. S. 956 and remanded for further consideration. Following the rules laid down in that case, the damages were found to be $65,520, which award was affirmed and certiorari granted to the government. The entire question was whether the property was subject to a "navigational servitude" which does not require compensation under the United States Constitution. In many past decisions, this Court had held that an owner can be denied access to riparian lands, on navigable waters, and thus could prevent values from arising from uses dependent upon those very navigable waters. The majority of the court held that the government still had a duty to pay market values apart from that phase of the

case (p. 631) and approved the award, but reversed the case to make an allocation between the owner and the easement holder. Three justices dissented on the basis that no compensation should be paid under the "navigational servitude" right.

The navigational servitude doctrine has no application here. It had none in the Buckles case, nor in the Mason case. The entire purpose of the constitutional protections is to assure that neither the state, nor any person or entity under power granted by the state, shall take private property nor damage it without full compensation. If Illinois can say, either through its legislature or through a judicial tribunal, that none may compete for the property except a single corporation—then at least it must permit to be shown the value which would be paid upon a free and competitive market by persons similarly interested in such properties. Otherwise, the constitutional guarantees are meaningless.

It has become a habit, in eminent domain cases, for attorneys to ask a question concerning "the" highest and best use. This is an erroneous concept. It is necessary for all uses to which the property may be adapted concurrently to be considered upon the question of valuation—and it is not necessary that such use be made of the property at that time. Probably the leading work upon this subject is Orgel, *Valuation Under Eminent Domain.* In Volume I of the Second Edition of that work, commencing at page 138, the author states:

> "Suppose that a tract of vacant farmland is condemned. Up to the time of the taking, the farmer was actually using it only for pasturage, but a considerable part of it is available for tilling, and another part may well be used for truck gardening. There is a very good prospect that, within the next few years, the tract may be divided up into lots and

sold for residence purposes. And there is reason to believe that a part of the tract may soon prove valuable for a stone quarry. * * *

"The courts are unanimous in refusing to limit the compensation to the value of the property for the purposes for which it has actually been used. Nor do they require any proof, or even any assertion, of the owner's intent to convert the property to a different use. And the fact that the owner may have been too ignorant, or too uninterested in money values, to take advantage of the full possibilities of his property would be treated by a court as entirely irrelevant. * * *

"In estimating the present market value of this land, can the appraiser afford to neglect all of the possible alternative uses of the property except a possible 'best use'? Obviously not; for one of the merits of this property, enhancing the price at which it can be sold, is that it is certainly adapted for some uses, probably adapted for other, more valuable uses, and possibly adapted for still other, and still more valuable uses."

Property may not be taken from an owner without full compensation. In Olson v. United States, 292 U. S. 246 at 255, it is stated:

> "The sum required to be paid to the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable."

And in McCandless v. United States, 298 U. S. 342 at 345, where land had been used as a cattle ranch but the owners had in view its ultimate use for sugar cane by establishing an irrigation system, and bringing water from a distance, this Court reversed for the trial court's refusal to allow offers of proof as to this proposed use, declaring:

> "The rule is well settled that, in condemnation cases, the most profitable use to which the land can probably be put in the reasonably near future may be shown and considered as bearing upon the market value; and the fact that such use can be made only in connection with other lands does not necessarily exclude it from consideration if the possibility of such connection is reasonably sufficient to affect market value."

Despite the clear impact of these various holdings, the trial court insisted upon a "single use" rule, both in admitting testimony and in jury instructions. The court would not permit argument to the jury upon the matter of concurrent uses. Experts presented by the landowners were denied the right to speak of the potential of the property for more than a single use, and were restricted completely to the use of the surface of the land, even though it was the subsurface which was being taken.

Surely it must be apparent that the surface of land can be used for farming, while that portion of the land beneath the surface may have a completely different and yet valuable use—as for shaft mining. Courts have recognized that surface land may be valuable for railroad tracks, and the space above it possess tremendous value for office buildings. The ownership of land carries with it reasonable air rights, surface rights, and subsurface rights. These are concurrently available uses, for the taking of which—or diminution of which—the owner is entitled to be compensated. For the trial court to insist that each witness limit his approach to one use, and one use only, here "farm land", is contrary to law, inconsistent with the realities of property ownership, and a deprivation of valuable rights without, for all practical purposes, a jury trial, since the jury was not permitted to hear any of the defendants' offered evidence and was instructed that such elements could not be considered.

As set forth in 29 *C. J. S.*, "Eminent Domain", § 273:

> "* * * no evidence should be excluded which an ordinary prudent man would take into account before forming a judgment as to the market value of property which he is about to purchase."

The trial court's rulings were, further, that the legislature and the Illinois Commerce Commission could restrict bidding to a single buyer. And, carrying it one step further, since only one person would be permitted to buy, evidence would not be received as to the value of that same article in the open market, nor would evidence even be admitted to show that there was an open market for the purchase of such item. We contend that the action of the legislature, so construed, constitutes a complete abrogation of the constitutional guarantees to which we have made reference, since the landowners are entitled to valuations based upon a free and competitive market not restricted by any legislative act. By legislative fiat, they are forced to deal with a single purchaser upon its terms, and denied for all practical purposes the right of trial by jury. The form is preserved, but the substance is gone; it becomes a sham, a mockery, as to every constitutional guarantee to which we have made reference.

As shown in the Statement of Facts, there was abundant evidence to show an existing, aggressive market for such structures and a need which—under freely competitive conditions—would have exceeded the $500 to $600 per acre which has been paid in similar areas. This evidence should have been received.

To boil down authorities upon which we rely, this Court pointed out in Pennsylvania Coal Company v. Mahon, 260 U. S. 393 at 414, 415, that where "regulation" goes too far, it amounts to a "taking". And many authorities

make it clear that a special adaptability, which is not solely useful to the condemnor but which others also could utilize, must be considered in determining value, 15 *American Jurisprudence* 882, 883; 124 *A. L. R.* 910 at 914; 106 *A. L. R.* 955 at 968; Olson v. United States, 292 U. S. 246 at 256; Grand River Dam Authority v. Grand-Hydro, 335 U. S. 359 at 367.

The witnesses offered by the defendants upon value, as well as upon items of depreciation in value and damage caused by the taking, were properly qualified, Wigmore on *Evidence*, Third Edition, §§ 665, 687. Indeed, since their testimony had to be presented by offers of proof, no attack obviously was made upon their qualifications, learning, or basis of their opinions. And they were prepared to demonstrate—which the experts for the plaintiff did not—the prices voluntarily paid by other utility companies in acquiring gas storage aquifers similarly situated.

Perhaps an analogy will be of assistance here. It is common to compare a subsurface thing of value, such as the formations in this case, to a valuable but unexploited oil field. Even closer to our situation might be an unoccupied apartment building. The petitioner here is not going to build a structure to house its gas; the structure is already in existence. Many would like to move into our apartment building. The question is, what will they pay in cash, in a single sum, or as capitalized rental, for the privilege of such occupancy? That which is present is "space"—but it is useable, quite valuable, space. The value depends upon the persons desiring to occupy it, how many there are, and what they are willing to pay. The location of such structure to metropolitan areas may be important, as well as the amount of occupancy it can provide. Our State cannot legislate and say: "You may rent it only to Sears-Roebuck for the use of its employees"—because then Sears-Roebuck could name the

rental price, which might be as low as five dollars per apartment per month. Rather, we must assume that all persons are free to compete for the occupancy of this valuable structure, and determine from their anxiety to possess it what the maximum sum of money is which will be paid.

The Illinois Courts limited their consideration of water losses to the strata then being employed (66 Ill. App. 2d at pp. 68, 74, 75). This was unrealistic when the proof offered by the defendants, but excluded, showed the disappearance of artesian wells, once abundant in that area (Abst. 131, 175), the decline in artesian pressure of four to seven feet per year (Abst. 212), the fact that existing wells now go dry during certain periods (Abst. 175), and the inadequacy of groundwater resources to support proposed irrigation (Abst. 127). The Illinois Commerce Commission may have had a legal right to grant a certificate to the plaintiff to acquire these water saturated strata, but no such proceeding should be able to preclude evidence from being introduced before a jury in the valuation hearing as to the necessity for these water resources in utilizing these lands in the future, and the effect of their deprivation upon the possibilities of contemplated irrigation and consequent reduction in value.

Likewise the Appellate Court approved the trial court's refusal to permit testimony to show the effect of gas storage upon the destruction of shallow wells. Let us make this very clear. It held that the Commission finding that the Maquoketa formation would not permit leakage to the surface was conclusive. This was the same court which, two years earlier, on appeal from the Commission's finding, had held in Canady v. Northern Illinois Gas Company, 43 Ill. App. 2d 112 at 114-118:

> "The Northern Illinois Gas Company introduced evidence to the following effect: The water supply

for the area in question is taken from formations above the St. Peter formation and it is adequate now and for the foreseeable future. * * *

"The evidence offered by the landowners was to the opposite effect. They introduced evidence that the water supplies in the area are becoming depleted; that there is an ever increasing demand for water for irrigation purposes; that there is a useable and unlimited supply of water in the St. Peter formation which will be displaced by the storage of gas; and that gas stored in the St. Peter formation will escape, destroy the wells now in operation in the area and constitute a distinct hazard to the landowners and the public.

"It is apparent that the question involved is a serious one and that the opinions of the experts are in complete conflict.

"The legislature has entrusted the Commerce Commission with the responsibility of approving or disapproving projects such as the one involved in this case and from our study of the record we do not feel justified in interfering with the order which was entered by the Commission and affirmed by the circuit court."

In other words, since there was equally persuasive evidence both ways, the reviewing court would not disturb the finding of the Commission that a certificate should be granted to permit exploration. But let us be clear as to what this means. If there was powerful evidence to show the possibilities of leakage—and additional evidence had come to light in the intervening two years when Mahomet leaked and destroyed wells—then certainly a jury had a right to consider such testimony in determining damages to the remainder, and valuation experts had a right to take this into consideration in determining the price which a willing purchaser would pay for the lands

burdened with this easement. The jury, or such experts, might accept or might reject our theory, but by every right invested by our Constitution, neither it nor they could be precluded from considering such evidence and believing it or disbelieving it.

Any person, including attorneys, may develop a blind spot in viewing a case. Perhaps we have, in this situation. Certainly the trial court and the reviewing court seem to have developed such a blind spot, first, in stating correctly that only the certificate holder could condemn—but then deducing from such statement that this automatically permits the condemnor to exclude all evidence of what others, if granted certificates or negotiating privately without a certificate, would pay. It seems equally clear that although a court may correctly say that there was evidence of nonleakage which would suport the grant of a certificate, it misses the issue when it says that no evidence may be heard by a jury or considered by valuation experts which conflicts with a factual conclusion reached by an administrative body (not charged with the obligation to determine value).

It is quite one thing to say that a lay tribunal may issue certificates; it is quite different to say that on the hearing to take away a man's property (or interests in property) he has lost his right to a jury trial as to the value of that taken.

As to the right of a jury to hear evidence relating to proposed further irrigation, this was settled in McCandless v. United States, 298 U. S. 342 (which even required flowage over the lands of others). This decision was brought to the attention of the Illinois courts, but, as in the *Grand-Hydro* citation, it was simply ignored. As to the feasibility of landowners working voluntarily together to set up a storage field of their own, *ante,* 9, 10, this Court resolved this question favorably to our position in

United States ex rel. Tennessee Valley Authority v. Powelson, 319 U. S. 266 at 276; see also 18 *American Jurisprudence* 880.

There is one final factor which reasonably could affect the price which a purchaser of defendants' lands might, in the future, pay for them. That is the reasonable fear of fires and explosions resulting from such inflammable gases stored under pressure escaping upward. Our position upon this is quite simple:

1. The fact that the Commission granted a certificate of convenience and necessity, upon conflicting evidence, to acquire these interests for testing cannot preclude the reception of evidence in an eminent domain case where the issues of **value** and **damage** must be fixed;

2. Whether the fears of such a buyer are reasonable or unreasonable is for the jury to determine as a question of fact, not for the trial court to resolve as a matter of law. Jurors know better than judges how other laymen will react in given circumstances—and such occurrences had taken place in both gas storage fields nearest to Crescent City;

3. If experts are reasonably qualified by study and training, as well as by familiarity with like projects, to express opinions upon value, they have a right to take all factors into consideration which will affect the price which a willing purchaser voluntarily would take. The arbitrary refusal of the trial judge to permit the defendants' experts to consider these factors was improper.

The trial court would not permit any evidence, either lay nor expert, as to what had happened elsewhere or what would happen in the future with gas injected under the soil at this place. Dr. Alfred H. Bell, of the Illinois State Geological Survey, who had made a study of all gas aquifers in this area had testified when called as a

witness by the utility company in the Commission hearings, that in each aquifer where the Maquoketa (as was planned here) was used as a caprock, injected gas had escaped through such caprock and up to the surface. Defendants' exhibits 1-6 are photographs taken of just such situations as we are here discussing. The defendants were not permitted to show that in the Laclede project, gas had escaped far beyond the perimeter of the project so as to require the closing of the St. Louis Airport. We were not permitted to show the escape of gas upward at Herscher, only seventeen miles away, which destroyed the water well supplies in that area and caused a fire and explosion sufficient in size to require seventy-six asbestos clad firemen to bring it under control. Our offer of proof was denied as to the occurrences at Mahomet, less than fifty miles away. These offers show that when gas was injected at Mahomet for testing purposes, it escaped laterally through the soil and emerged through a farm well a mile and a half distant from the place where it was injected. When a well was subsequently drilled to replace that one, by the utility company, an explosion occurred, a man was injured, millions of cubic feet of gas escaped, the rigging was twisted and deformed by the heat of the fire, and the blaze could be seen for miles.

The total exclusion of such testimony as to what has occurred nearby, under like circumstances, and by experts as to what they reasonably predict will occur in this situation, is too important to withdraw it wholly from the consideration of those persons charged with the duty of determining value.

It is apparent that any and all evidence which is helpful to the jury in determining what should be paid as a result of the taking, based upon values for the highest and best uses to which the property may be adapted,

assuming a willing seller and a willing buyer, both fully informed, operating upon a free market with all competitors permitted to intervene, and taking into consideration all damages which will be caused by the project in full operation, must be taken into consideration. Any other result is unconstitutional.

It will be seen from the above and foregoing matters that no value was ever placed by any witness for the plaintiff upon the permanent, assignable easement which it is taking from the landowners. No effort was ever made to measure it, nor were we permitted to do so. In fact, no effort was made to value the property in its original state containing this valuable storage formation, taking into consideration the market existing for such storage aquifers, and its value with these subsurface strata removed. Nor were the other procedures and tests calculated to give the jury a fair and accurate idea of the monetary loss sustained by the landowners.

A statute may be enacted which subordinates private interests to the public welfare, and which permits the taking of private property, or interests in private property, wherever it is deemed to be for the public good. But, when this is done, the law must make provision for fair and adequate compensation for that which is taken, and all damages resulting from such taking. We do not believe that either a legislature or any court may create a situation where property is taken under circumstances where the existence of market value must be excluded, or create a "single buyer" situation under which the prices which others would pay becomes immaterial. Nor do we believe it proper to exclude from consideration of the jury those factors which reasonable men would take into consideration in fixing the price which they would be willing to pay for the property with certain interests removed, or saddled with a particular burden.

PRAYER FOR RELIEF.

It is, therefore, respectfully submitted that a writ of certiorari issue to review the judgments and orders of the Appellate Court of Illinois as confirmed by the Supreme Court of that state by denial of the petition for leave to appeal; and that the judgments of the trial court be vacated and new trials ordered.

Respectfully submitted,

JOHANNAH H. WIENRANK, DONALD R. WIENRANK, ANNABELL WIENRANK, CLARA CANADY, HERBERT E. MYERS, GOLDIE H. CENTER, WENDELL F. CENTER, CHRISTINE LIETZ, EDWARD LIETZ, MATHILDA ASH, JOHN J. ASH, JOHN C. WIENRANK, ELSIE WIENRANK, JOHN ASH, JERRY ASH, DONALD R, WIENRANK, as Executor of the Estate of Christ J. Wienrank, Deceased,
Defendants-Petitioners, by

.....
JOHN ALAN APPLEMAN,
Their Attorney.

Law Offices:
John Alan Appleman
Route 1
Urbana, Illinois 61801
Telephone: 367-1178 (217)
Attorney for Petitioners

Proof of Service.

I, John Alan Appleman, attorney for the petitioners, hereby certify that on the .... day of ....., 1966, I served appropriate copies of the foregoing petition for writ of certiorari upon the attorneys for the plaintiff-respondent by mailing copies to their addresses in duly addressed envelopes, with postage prepaid.

.....

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APPENDIX.

Jury Verdicts and Judgments entered November 15, 1963, the illustrative one being from case 34863:

We, the Jury, in the above-entitled cause having been duly selected, empaneled and sworn, and having heard the proof offered, and having considered the instructions given by the Court, report that we have well and truly ascertained the just compensation to be paid by the Petitioner in this cause to the owners of and persons interested in the parcels of land and property hereinafter described, for the taking by such Petitioner of a right and perpetual easement therein for the purposes set forth in the Petition to Condemn, as amended, on file in this cause, and the just compensation to be paid to the owners of and persons interested in the parcels of land and property taken and damaged as hereinafter set forth:

To the owners of and persons interested in the parcels of land legally described as follows:

Parcel No. 1.

The East Half and the Northwest Quarter of the Northwest Quarter of Section 34, Township 27 North, Range 13 West of the 2nd P. M., situated in Iroquois County, Illinois; 120.964 acres; as just compensation for the taking of said exclusive right and perpetual easement, in the land and property hereinabove described the sum of Nine Thousand Seventy-two and 30/100 Dollars ($9,072.30);

Parcel No. 2.

The Southwest Quarter of the Northwest Quarter of Section 34, Township 27 North, Range 13 West of the 2nd P. M., situated in Iroquois County, Illinois; 40 acres; as just compensation for the taking of said exclusive right and perpetual easement, in the land and property herein-

above described, the sum of Three Thousand and no/100 Dollars ($3,000.00).

And we, the Jury, find the payment of the sum of money to the owners of and persons interested in the parcels of land and property as hereinabove set forth, will justly compensate them for the taking by the Petitioner of said exclusive right and perpetual easement.

Lorenzo Smith
Foreman
Joseph B. Eckles
Eileen Ashton
Lola M. Roy
Gussie Lee
Margaret Wille
Lillian Newman
Grover C. Norris
Elmer Brinkmann
Charles H. O'Nele
Joseph H. Reinhart

Whereupon, Petitioner moves for judgment on said verdict and all persons interested being before the Court, and the Court being fully advised in the premises:

It Is Therefore Ordered, Adjudged and Decreed by the Court that the verdict of the jury is correct and is thereby approved, confirmed and ordered to be recorded as provided by law;

It Is Further Ordered, Adjudged and Decreed That the just and full compensation to be paid by Petitioner for or in respect of the property sought to be appropriated or damaged for the purposes of the taking by Petitioner of said exclusive right and perpetual easement, assignable to other authorized public utilities, herein described is as set forth in the verdict of the Jury, namely Twelve Thousand Seventy-two and 30/100 Dollars ($12,072.30); and

It is Further Ordered, Adjudged and Decreed that Petitioner may enter upon and use the property right condemned as set forth in the petition as amended upon

payment of said compensation, as hereby ascertained to the County Treasurer of Kankakee County, Illinois, within ninety days from the date hereof and this order with evidence of such payment shall constitute complete justification for the taking by Petitioner of the aforementioned exclusive right, privilege and easement for the development, construction, operation and maintenance of an underground gas storage facility 590 feet or more below the surface of the ground and down to the bottom of the St. Peter sandstone formation, including the introduction of gas into and the storage of gas in said geological formations with the right to retain possession of such gas so stored and the right to withdraw such gas with any water vapors absorbed by it from said geological strata, which easement is perpetual and assignable by Petitioner to other authorized public utilities and applicable to defendants' land described as:

Parcel No. 1.

The East Half and the Northwest Quarter of the Northwest Quarter of Section 34, Township 27 North, Range 14 West of the 2nd P. M., situated in Iroquois County, Illinois.

Parcel No. 2.

The Southwest Quarter of the Northwest Quarter of Section 34, Township 27 North, Range 13 West of the 2nd P. M., situated in Iroquois County, Illinois.

that said rights are to be fully enjoyed by Petitioner, who has power and authority to prevent any activities from interfering with the full enjoyment of said rights, all as part of and in connection with a facility for the storage of gas under the above-described lands and other lands in the vicinity thereof, all in accordance with the provisions of the amended petition, as amended, in this cause;

It Is Further Ordered, Adjudged and Decreed that Petitioner shall pay the costs of this proceeding to be taxed

by the Clerk of this Court in pursuance of the statutes in such cases made and provided.

(Identical judgments in all cases; verdict amounts, as follows):

Parcel No. 1—Case 34860—41.3172 acres—$3,102.90.

Parcel No. 2—Case 34860—41.006 acres—$3,075.45.

Parcel No. 1—Case 34861—80.561 acres—$6,042.75.

Parcel No. 1—Case 38462—40.7685 acres—$3,057.64.

Parcel No. 2—Case 38462—2.398 acres—$152.98.

Parcel No. 1—Case 34863—120.964 acres—$9,072.30.

Parcel No. 2—Case 34863—40 acres—$3,000.

* * *

Northern Illinois Gas Co. v. Wienrank, et al., 66 Ill. App. 2d 60, 213 N. E. 2d 411.

Alloy, P. J.

This cause, which involves the condemnation of underground strata for gas storage purposes, was originally appealed to the Supreme Court of the State of Illinois. The Supreme Court, on March 10, 1965, caused this action to be transferred to this court and, in so doing, observed that it was argued that the ruling excluding evidence of special value of the land for gas storage purposes deprived the landowners of due process of law and also violated the constitutional provision that private property shall not be taken for public use without just compensation. The court stated that substantially the same issues were involved in Midwestern Gas Transmission Co. v. Mason, 31 Ill. 2d 340, 201 N. E. 2d 379, and Peoples Gas Light & Coke Co. v. Buckles, 24 Ill. 2d 520, 182 N. E. 2d 169. In view of the decisions in such cases, the Supreme Court concluded that the constitutional issues are no longer fairly debatable, and transferred the cause to this court for determination.

The cause originated in four cases brought by Petitioner Northern Illinois Gas Company which were consolidated for trial. Actions were instituted under the Illinois Eminent Domain Act (Ill. Rev. Stats. 1963, c. 47, § 1, et seq.). As a result of such proceeding, Defendants were awarded a total of $27,503.35 as just compensation for the taking by Petitioner Northern Illinois Gas Company of certain subsurface easements in 366.7 acres for underground gas storage at a site near Crescent City in Iroquois County, Illinois. A change of venue had been granted from Iroquois County Circuit Court to Kankakee County Circuit Court on ground of alleged prejudice of the Presiding Judge. The cause was tried before a jury and extended over a period of nearly two weeks in November of 1963. Judgment orders were based on the jury's verdicts.

On appeal in this court, Defendants assert that since the petition condemned a "permanent, assignable easement" in all strata from 590 feet below the surface to the bottom of the St. Peter sandstone (an easement acquisition of approximately 800 feet in depth) that such easement is a freehold, i. e. an interest in land to which the test is the value of the freehold taken plus the amount of damage to the remaining property. It is contended that the Trial Court erred in using improper standards or tests for the measurement of such value. It is also contended that the Trial Court erred in receiving testimony of Petitioner's experts and excluding testimony of defense experts based on the following considerations:

1. That the testimony was restricted to a "single use" test, rejecting the test of concurrent consistent uses as comprising value.

2. That such testimony was restricted to a "single bidder" rule, rejecting testimony as to the existence of a competitive market and known values in that market.

3. All testimony of owners, it is contended, was rejected where based upon (a) adaptability of the land to irrigation (b) value under conditions of irrigation (c) destruction of such potential as a result of gas storage (d) diminution of market value from reasonable fears of gas escaping with subsequent damage to wells and property, and (e) capacity of the land to be used separately or in combination for storage purposes under newly discovered procedures.

It is contended basically that the exclusion of all such testimony, and adherence to the procedures followed in the case constituted reversible error.

There is also a contention that the Trial Court impeded discovery procedures by denying access to pump test data although Petitioner's witnesses testified to these at time of trial and defense witnesses were cross-examined as to their ignorance of such data. It is likewise contended that the court took part in the trial by interrogation of witnesses and making of audible comments before the jury to such an extent that motions for mistrial should have been granted.

Petitioner was originally authorized to institute the condemnation action by an order entered by the Illinois Commerce Commission on April 18, 1962, which approved the preliminary development by Petitioner of an underground gas storage project near Crescent City. Some of the Defendants had intervened and participated in the proceedings before the Illinois Commerce Commission in opposition to the proposal by Petitioner to develop the project. An appeal was taken from the order of the Commerce Commission but was affirmed by the Circuit Court of Kankakee County and by the Appellate Court in Canady v. Northern Illinois Gas Co., 43 Ill. App. 2d 112, 193 N. E. 2d 48. Petition for leave to appeal was denied in the Supreme Court (in 28 Ill. 2d 625).

The petitioning utility is engaged in the business of distributing and selling natural gas to more than 800,000 customers in the northern part of Illinois, and is a public utility regulated by the Illinois Commerce Commission under the Illinois Public Utilities Act. The development of the Crescent City Field which was approved by the Illinois Commerce Commission is designed to allow Petitioner to store large volumes of natural gas in a geological structure approximately 1,200 feet below the surface of the land, and will aid Petitioner in meeting the rapidly expanding needs of the public for natural gas in the service territory. The land involved in the Petitioner's preliminary development of the project has a total area of about 5,300 acres. The parcels involved in the case before us total an area 366.7 acres. The largest of the parcels is 120 acres in area and the largest contiguous area of any combination of the parcels is 160 acres with the smallest consisting of an area of 2 acres.

Gas storage in the field will take place in what is known as the St. Peter sandstone formation which in its natural state is saturated with water but which in the operation of the storage facility will have gas injected from the surface into the sandstone under pressure which pushes out and takes the place of some of the water in the pores of the sandstone. This is known as the aquifer-type gas storage project. No wells or other surface facilities of Petitioner will be located on the parcels of land involved in the case but the gas will enter the St. Peter sandstone under these parcels of land laterally after being injected through wells located on other parcels. Immediately above the St. Peter sandstone in the field are about 400 feet of alternating layers of limestone and dolomite and above that is a formation known as the Maquoketa formation which begins about 800 feet below the land surface and extends upward for about 200 feet to within 590 feet of the land surface. This formation

consists of a lower dense shale member, a middle limestone member, and an upper dense shale member. Above this formation is the Silurian formation which is about 400 feet thick and immediately above that is glacial drift which is about 200 feet thick. It is contemplated and found in the order entered by the Illinois Commerce Commission that the injected gas would not rise into or through the Maquoketa formation and that it would be confined to the geological strata lying more than 590 feet below the land surface at the Crescent City Field.

In the condemnation petitions Petitioner sought and obtained under certain judgment orders, underground gas storage easements in the parcels of land involved in the case covering a portion of the subsurface which starts at a depth of 590 feet or more below the land surface and goes down through the bottom of the St. Peter sandstone formation. In the petitions to condemn Petitioner undertook to conduct its operations in such manner as will permit the owner or owners of the land or other persons claiming an interest therein for minerals thereunder to explore for, drill, recover oil or gas under the land, or drill wells on the land for development of the production of water or disposition of salt water, fresh water or waste material from any of the formations other than those between the bottom of the St. Peter sandstone formation and the top of the Maquoketa formation in such manner as will not impair the efficiency or safety of Petitioner's operations.

The source of water in the Crescent City Field is in the glacial drift and Silurian formations, so that the water sources are above and would be protected by the Maquoketa formation since the deepest well on parcels of the land in question is about 130 feet deep and no farm water wells in the area go below the Silurian formation. The water in the area is of good quality and sufficient for the needs of the area. The lands are used for

grain farming with the addition of livestock raising. None of the parcels has ever been irrigated but the farms had good crop yields in 1962.

The Illinois Commerce Commission order found that the Maquoketa formation at Crescent City Field would form an impermeable caprock or barrier to prevent the vertical migration of any injected gas which might reach it. An independent consultant to Petitioner testified that in his opinion the Maquoketa formation would form an impermeable cap at the Crescent City Field and also that the project had been tested more extensively than any project he knows of in the United States or in Europe. This consultant is a professor at the University of California who is obviously well qualified in the field. Three valuation witnesses presented by Petitioner each testified that the impressment and use to fullest extent of underground gas storage easements sought by Petitioner would in no way impair the use of each of the parcels for farming and residential purposes. They also testified that the highest and best use of each of the parcels of land on the respective dates when the petitions to condemn were filed, was for farming and residential use. Each of Defendants' three valuation witnesses also testified that the parcels of land were used for farming and residential purposes on such dates and that without considering Defendants' offer of proof concerning possible use for underground gas storage, the highest and best use of the lands was for farming and residential purposes. Petitioner's valuation witnesses testified that the fair cash market value of each of the parcels for such use after the underground gas storage easement is impressed to its fullest extent on the parcels would be diminished by $25 per acre as compared to the value of the parcel for such highest and best use as of the date of the petitions for condemnation. Each witness also testified that in his opinion there would be no damage to the remainder of the land

not taken as a result of the impressment of the easement. One of Defendants' witnesses testified that the diminution in value on the same basis would be $125 per acre; another witness, that the diminution in value would be $250 per acre; and the third, that the diminution in value would be $275 per acre.

The jury viewed the surface of the parcels of land involved in the case and found that the fair cash market value of each of the parcels of land for its highest and best use as defined, that is, for agricultural and residential purposes, on the date of the condemnation petition would be diminished at the rate of $75 per acre by impressment on the parcel of the underground storage easement utilized to its fullest extent.

Defense objections, which were overruled, to the testimony of Petitioner's valuation experts were on the grounds (1) that a perpetual easement constitutes a freehold and that as such it must be valued separately (2) that the witnesses limited their testimony to a single use instead of the concurrent consistent uses to which the property was readily adaptable (3) that the opinions did not take into consideration a market value for the aquifer based upon competition therefor (4) that the witnesses were not qualified to express such opinion and (5) that no consideration was given to whether the land could be irrigated or the potentiality of gas escape or effect on value.

The primary question for consideration in this cause is whether or not the refusal of the Trial Court to admit evidence proffered by Defendants of the value of the parcels of land for underground gas storage was a proper ruling and consistent with the precedents in this State. The Trial Court refused to admit the evidence on the ground that it involved matters too remote and speculative to be relevant in the case and, in the process, relied

upon the decisions of the Illinois Supreme Court in Peoples Gas Light & Coke Co. v. Buckles, 24 Ill. 2d 520, 182 N. E. 2d 169, and Midwestern Gas Transmission Co. v. Mason, 31 Ill. 2d 340, 201 N. E. 2d 379. In both the Buckles and Mason cases, the utility company had received from the Illinois Commerce Commission under the Illinois Gas Storage Act authorization to bring the condemnation proceedings to obtain an easement for underground gas storage. In each of the cases, the landowner received as just compensation the fair cash market value of the parcel of land in question for its highest and best use on the date the petition for condemnation was filed, less the fair cash market value, on the same basis, after the parcel had been impressed to the fullest extent with the gas easement being taken. In each of these cases, the Supreme Court approved the rejection of evidence offered by the landowner of the value of the parcel for underground gas storage upon the ground that such proffered evidence was too remote and speculative.

An attempt is made to distinguish the present case on the facts from Buckles and Mason. For example, it is contended that the gas company in the Buckles case sought an underground gas storage easement in only a single geological formation, the St. Peter sandstone, while in the present case, the Petitioner seeks an underground gas storage easement in several geological formations ranging upward to the Maquoketa formation. We see no substance to this argument particularly in view of the fact that in the Mason case the utility company did, as here, seek underground gas storage easements in several subsurface formations.

[1] It is also contended that the underground gas storage easements which Petitioner seeks herein are somehow different from underground gas storage easements which the gas company sought in the Buckles and Mason cases in that the Petitioners here are seeking a "perma-

nent assignable easement" as opposed to what Defendants contend were limited easements taken in the Buckles and Mason cases. In the Buckles case, the gas company sought and obtained an "exclusive easement" for underground gas storage. In the Mason case, the gas company obtained a "permanent exclusive easement" for the same purpose. In the case before us, Petitioner sought and obtained an "exclusive easement" which easement is by its terms "perpetual and assignable by Petitioner to other authorized public utilities." We see no basic or fundamental difference in the easements sought in each of the three cases. They were easements for public utility facilities and assignable to other public utility corporations. It is further contended that while the takings in the Buckles and Mason cases were of limited easements, that in the present the easement was of a higher quality, a freehold, and, therefore, that a different measure of compensation must be applied. The Supreme Court of this State has stated in Peoples Gas Light & Coke Co. v. Buckles, 24 Ill. 2d 520, at 532, 533, 182 N. E. 2d 169, "No taking of the fee or damage to the surface of land is involved. Plaintiff's taking amounts to no more than an easement, and the usual measure of damages payable to such cases is based upon diminution of the fair cash market value of the property burdened by the easement." This recital specifically answers the contention made by Defendants herein referred to and the conclusion would be applicable in this case.

[2] It is also reasoned that in the Buckles and Mason cases the Court found that there was no competent evidence that the geological formations in which the gas was to be stored had any value, while in the present case Defendants offered evidence as to the value for underground gas storage of such subsurface formations. This analysis is contrary to the conclusion in both the Buckles and Mason cases where the court concluded that evidence

of the value of small parcels of land for underground gas storage was too remote and speculative to be admitted or considered. In the scholarly brief presented by Defendants it is suggested that this court overrule the Buckles and Mason decisions at least as applied to the state of facts before us in the instant case. An examination of such cases and the facts and circumstances in the present case furnishes, we believe, no reasonable basis for overruling or distinguishing the principles announced in both the Buckles and Mason cases and we, therefore, believe that the Trial Court properly determined that evidence of the value of the parcels for underground gas storage was too remote and speculative to be admissible, particularly in view of the fact that there was no basis in the evidence to show that there was a reasonable possibility that the small parcels could be used as individual underground gas storage projects.

[3-5] We also feel that the refusal of the Trial Court to admit Defendants' tendered evidence relating to the adverse effect of the possible gas leakage was proper under the record before us. The Commerce Commission proceeding in its order which authorized Petitioner to bring present condemnation proceedings culminated in a finding that the Maquoketa formation would provide an impermeable caprock for the project, and that order was affirmed specifically in Canady v. Northern Illinois Gas Co., 43 Ill. App. 2d 112, 193 N. E. 2d 48. In the Canady case, the Appellate Court was considering the propriety of the Illinois Commerce Commission order as reviewed under the Gas Storage Act (Ill. Rev. Stats. 1961, c. 104, §§ 104-112) and determined that the order of the Commerce Commission approving the project was not contrary to the manifest weight of the evidence in the finding that there would be no adverse effect on water resources. As we view the record in this case, there was no attempt to undertake a collateral attack on the Commerce Com-

mission order, which would not have been sanctioned (Peoples Gas Light & Coke Co. v. Buckles, supra; Chicago North Shore & M. R. Co. v. Chicago, 331 Ill. 360, 163 N. E. 141). The Trial Court in this cause actually heard evidence on the issue of whether or not there was a reasonable possibility that the injected gas would migrate above the Maquoketa and, on the basis of the record, concluded that the substantial weight of the evidence supported a conclusion that there was no reasonable possibility of such gas leakage above the Maquoketa. We believe the record sustains that conclusion. One of the Defendants' two technical witnesses expressed no opinion on the likelihood of gas leakage above the Maquoketa. The other witness who did assert that it would not be an impermeable caprock stated that he had not examined the cores taken from the Maquoketa in the Crescent City Field and admitted that he had previously testified in the Commerce Commission proceeding to the effect that he would not expect the gas to get through that shale to the surface as he felt it was a good tight rock. Evidence concerning other unrelated gas storage projects, where no degree of similarity is shown, would not have been proper. It was indicated by the expert witnesses that each of the storage projects must be studied on its own merits and that caprock properties are not necessarily uniform from one aquifer project to another.

[6, 7] The attempt to offer evidence of other unrelated gas storage projects, namely Herscher and Mohamet, to show a reasonable possibility that there would be gas leakage above the Maquoketa failed, under the record, to show a reasonable similarity between the gas storage project under consideration and the other projects referred to. The Trial Court's conclusion, on the record, that there is no reasonable possibility that gas injected into the Crescent City Field would migrate vertically above the Maquoketa formation, likewise justified the court's

refusal to allow testimony as to adverse effect or danger of fire and destruction of water resources in the glacial drift and Silurian formations of possible gas leakage above the Maquoketa formation. Before consideration of an element of danger and diminution in value there must be a substantial danger or reasonable possibility of a direct disturbance of a property right (Central Illinois Light Co. v. Nierstheimer, 26 Ill. 2d 136, 185 N. E. 2d 841; Illinois Power & Light Corp. v. Talbott, 321 Ill. 538, 152 N. E. 486). In both of the cases referred to, the Supreme Court held that fear of danger and fire may not be considered as elements of damage or in diminution of value in cases involving condemnations of easements for overhead power lines. Under the record in this case we believe the same principle would apply here.

[8] It is apparent from the record that present water resources in the glacial drift and Silurian formations would not be affected by the underground gas storage and there was no showing of a reasonable possibility that the user would have cause to go below the glacial drift and Silurian for water supplies. To the extent that there might be any loss of water in the St. Peter formation and other strata covered by the gas storage easement, the jury heard the valuation witnesses testify with respect to the effect on water in such formations and apparently considered it in arriving at the award. Similarly, the contentions made with respect to possible irrigation of the farms does not make the awards inadequate on the record before us. The evidence indicated that present water resources, which would not be affected by the underground gas storage, would be sufficient to support irrigation of the farms if such irrigation were undertaken.

[9-11] Action of the Trial Court in sustaining objections to an opinion from a witness tendered by Defendants was proper, since the Trial Court has a broad dis-

cretion in determining whether or not a witness has been qualified as an expert in a manner which would allow him to present opinion evidence (County of Cook v. Holland, 3 Ill. 2d 36, 119 N. E. 2d 760). The witness had testified that he was a vegetable and grain farmer and irrigates his farm and there was no evidence as to the similarity of the particular land to farms which the witness had seen which might have been irrigated or to his own farm nor was he an expert on irrigation in any respect. Similarly, another witness who was asked his opinion as to the adequacy of the glacial drift water supply to support irrigation, had indicated that he had made no specific studies of ground water reserves in the county. It is obvious that the court did not abuse its discretion in refusing such testimony. The fact that a witness actually testified as to some related matters on behalf of Petitioner (but who was qualified as a geologist and hydrologist and who was also familiar with the water resources in the area, having studied these matters) furnished no substantial basis to reverse the ruling of the Trial Court as to witnesses referred to which it deemed nonqualified.

[12-14] It is also contended by Defendants that the Trial Court in making rulings on the evidence, by implication criticized or rebuked counsel for Defendants in a manner which prejudiced Defendants in the eyes of the jury and also that Defendants were prejudiced when the Trial Court questioned certain witnesses and thereafter made rulings. While the record discloses that the Trial Court sustained Petitioner's objections to Defendants' evidence and offers of evidence, such rulings were consistent with the precedents referred to in the course of this opinion. As stated in Department of Public Works & Buildings v. Diggins, 374 Ill. 11, at page 16, 27 N. E. 2d 826, while remarks of a court made to or in the presence of the jury and having the force of an instruction or

opinion on the evidence may be ground for reversal, the Trial Court may properly give its reasons for ruling upon the evidence and it should be accorded reasonable latitude in so doing. As indicated in that case, not every unguarded expression of the Judge stating his reason for his ruling can or should be treated as a ground for granting a new trial unless prejudicial error is clearly shown. The court undertook to question certain witnesses. As the record shows, this was largely done prior to ruling on motions as to their testimony and obviously for the purpose of being clear as to the testimony before ruling on the motion. Such occasional questioning by a Trial Court in absence of a manifest abuse of such procedure would not constitute reversible error (People v. Filas, 369 Ill. 51, at 55, 15 N. E. 2d 496).

[15, 16] On a review of the record and considering the testimony of the valuation witnesses, the verdicts of the jury awarding Defendants $75 per acre was consistent with the range of the testimony as actually presented. Where the court sustained objections to Defendants' interrogatories demanding information concerning certain "vertical water seal tests" undertaken on behalf of the Petitioner it was apparent that such test concerned only the feasibility of the gas storage project in the case and the disclosure could not have led to any relevant evidence on the basis of the record before us. The record indicates that Defendants' technical witnesses had been supplied with virtually all of the pumping test results in connection with the Commission proceeding and it is difficult to see how Defendants were prejudiced in this respect. The Court sustained objections to the offer of extracts from articles regarding "waterwall" experiments on the ground that they involved matters too remote and speculative and that the evidence was not properly presented, since nothing in the record justified the conclusion that such use could be made of the tracts

in question. On the basis of the exhibits in the record it appears that the court was right in making such ruling.

[17] Condemnation was undertaken and justified on the principle of nonleakage of gas above the Maquoketa formation and noninterference with water supplies in the glacial drift or Silurian formations but only in the St. Peter formation and other strata covered by the gas storage easement. It is axiomatic that if leakage does in fact occur in the future which causes damage outside the easement area, nothing in this proceeding would preclude recovery for such damage if the action for recovery is otherwise on a sound basis authorizing recovery.

[18] Defendants also contend that they had the right to open and close in the case. At the same time they recognized that Petitioner has the burden of establishing the just compensation which Defendants are to receive. The ruling of the Trial Court in granting the right to Petitioner to open and close and in final arguments is consistent with previous rulings on the same issue in eminent domain cases (South Park Com'rs v. School Trustees, 107 Ill. 489; McReynolds v. Burlington & O. R. Ry. Co., 106 Ill. 152, 157).

We do not believe it would be helpful to extend by repetition the conclusions of this court as to contentions made by Defendants which relate to or are similar to other contentions specifically discussed. A detailed analysis and further discussions of the contentions made by Defendants would require a repetition of conclusions stated in the course of the opinion and of the specific language of both the Peoples Gas Light & Coke Co. v. Buckles, supra, and Midwestern Gas Co. v. Mason, supra. We believe that the conclusions of the Supreme Court in these cases are precedents which are directly applicable to the cause before us. On the basis of such cases and on a review of the record, it is apparent that the jury awards

should be sustained. The proper standards for consideration of damages and the evidence relating thereto were applied consistently with the precedents of the Buckles and Mason cases. The case was tried fairly and the damages awarded were consistent with the evidence. The record discloses no errors in the proceeding which would require reversal. Accordingly the judgment of the Circuit Court of Kankakee County will be affirmed.

* * *

Peoples Gas Light and Coke Company v. Buckles, 24 Ill. 2d 520 at 530, 533, 534, 538, 539, 182 N. E. 2d 169:

"We next turn to defendants' primary argument and the basic issue in this proceeding, namely, the proper measure of damages to be used in determining the compensation payable to the defendants for impregnating with gas a subsurface strata lying under their land. The decision on this issue will determine the correctness of the trial court's rulings on the admissibility and refusal of evidence and whether or not the defendants, by the directed verdict, were denied their right of trial by jury. * * *

"The evidence which defendants sought to introduce and the offers of proof made by defendants were based on the valuation of a successfully operating gas-storage field. Defendants offered the testimony of petroleum engineers who had prepared figures of the possible amount of gas which could be stored in the Mahomet field assuming that it would be as capable as anticipated, and which showed that a reasonable development of the field would produce a future net revenue of $238,777,500 which was then discounted to obtain a present-day worth of $59,453,228 with the proportionate share of defendants' farm evaluated at $413,616. Other witnesses offered by defendants were prepared to testify that the highest and best use of defendants' land was for underground storage of natural gas and that the land for that purpose was worth $250,000 to $300,000 and, after the easement taking, it would be worth

from $50,000 to $100,000, so that the damage to the defendants' land was in the neighborhood of $200,000. The lower court rejected these offers of proof. * * *

"Neither is there a 'reasonable possibility' that the defendants could use their land together with the other lands necessary for a gas-storage field. Such a project not only depends on the putting together of some 5,000 acres, the minimum for the pilot operation of Mahomet, but also the obtaining of a certificate for the project from the Commerce Commission. The argument of defendants that other utilities had expressed interest in the availability of an underground storage area and, therefore, there is 'marketability' to the underground storage rights in the defendants' 160 acres, is without merit. Before any utility could operate a gas-storage project an order granting a certificate of public convenience and necessity would be required even though no condemnation was involved. (*Wilcox v. Commerce Com.*, 23 Ill. 2d 432.) It also seems wholly impracticable, if not impossible, for a regulatory body to grant more than one certificate to operate a gas-storage field in the same location. We cannot conceive of how the Commission could grant the plaintiff a certificate to operate a storage field in the St. Peter strata under the defendants' land and also grant to another utility the same right. While usually a certificate of public convenience and necessity only permits a limited monopoly and is not exclusive, yet there are certain times and types of operation in the utility field where certificates may be mutually exclusive. (*Ashbacker Radio Corp. v. Federal Communications Com.*, 326 U. S. 327, 90 L. ed. 108.) Consequently, the grant of a certificate to one would exclude the possibility of a grant to another. Therefore, the marketability of defendants' lands for a gas storage reservoir rests not only on a combination of other parcels but also on the grant of a certificate of public convenience and necessity, which makes any potential value from such use too

remote and speculative for consideration in a condemnation proceeding. (See: *United States v. Virginia Electric & Power Co.*, 365 U. S. 624.)"

• • •

Midwestern Gas Co. v. Mason, 31 Ill. 2d 340 at 341, 342, 201 N. E. 2d 379:

"The Illinois Commerce Commission entered an order prior to this proceeding approving the development, operation and maintenance of a gas storage reservoir by plaintiff pursuant to the provisions of the Illinois Gas Storage Act. Ill. Rev. Stat. 1963, chap. 104, pars. 104-112.

"Defendants complain that the commission's order granted a monopoly to plaintiff and thereby destroyed a potential market for the underground storage. They say this, coupled with the holding of *Peoples Gas Light and Coke Co. v. Buckles,* 24 Ill. 2d 520, holding that unique value and adaptability of the strata for gas storage cannot be considered, invalidates the Gas Storage Act as a violation of due process and the taking of property without compensation under section 13 of article II of our constitution. We understand their theory to be that failure of the gas storage act to provide for just compensation and its failure to provide a jury trial in connection with the Commission's proceedings renders the act unconstitutional.

"While the charge of unconstitutionality was on different grounds in the *Buckles* case, it is inherent in that opinion that an exclusive right of eminent domain may, in some cases, be granted without violation of due process. It was pointed out that it would be futile to grant a certificate to more than one public utility since the usability as a storage reservoir rests upon a combination of a number of parcels.

"The primary thrust of defendants' appeal is aimed at the measure of damages for the condemnation of a perma-

nent easement for the underground storage of natural gas. Certain offers of proof by defendants were for the purpose of establishing the highest and best use of the property to be as a gas storage reservoir and to show the value to the condemnor. This subject was exhaustively treated in *Peoples Gas Light and Coke Co. v. Buckles*, 24 Ill. 2d 520, and that opinion is decisive here."

* * * *

Canady v. Northern Illinois Gas Co., 43 Ill. App. 2d 112 at 114, 115, 117, 118, 193 N. E. 2d 48:

"The Northern Illinois Gas Company introduced evidence to the following effect: The water supply for the area in question is taken from formations above the St. Peter formation and it is adequate now and for the foreseeable future. * * *

"The evidence offered by the landowners was to the opposite effect. They introduced evidence that the water supplies in the area are becoming depleted; that there is an ever increasing demand for water for irrigation purposes; that there is a usable and unlimited supply of water in the St. Peter formation which will be displaced by the storage of gas; and that gas stored in the St. Peter formation will escape, destroy the wells now in operation in the area and constitute a distinct hazard to the landowners and the public.

"It is apparent that the question involved is a serious one and that the opinions of the experts are in complete conflict. * * *

"The legislature has entrusted the Commerce Commission with the responsibility of approving or disapproving projects such as the one involved in this case and from our study of the record we do not feel justified in interfering with the order which was entered by the Commission and affirmed by the circuit court."

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No. 317

Supreme Court of the United States

OCTOBER TERM, 1966

JOHANNAH H. WIENRANK, ET AL.,
Petitioners,

vs.

NORTHERN ILLINOIS GAS COMPANY,
Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois For The Third District

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BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Statement

Respondent, a public utility engaged in the distribution of natural gas, is seeking to develop an underground reservoir for the storage of such gas. The essence of the reservoir is an impermeable cap rock which gradually slopes downward over an area of several thousand acres to form a dome or inverted saucer more than 590 feet below the surface of the ground. The gas is injected

through the cap rock, known as Maquoketa shale, into the underlying porous formations where it displaces a portion of the water in these formations and is held in place by the sides and top of the cap rock dome and the water pressure beneath it. (Abst. 64-66; Add. Abst. 4-5.)

The instant case is an eminent domain action brought by respondent under the Illinois Eminent Domain Act to acquire the right to store gas in that part of the reservoir which underlies petitioners' land. No rights are sought on the surface of their land, for the necessary injection, withdrawal and observation wells are located elsewhere. (Abst. 217.)

In accordance with the Constitution and statutes of Illinois, Ill. Const. art. II, § 13; Ill. Rev. Stat., ch. 47, § 1 (1965), the question of the compensation to be paid petitioners for the taking of such right was submitted to a jury of twelve. At the conclusion of a trial, at which 18 witnesses testified over a period of nearly two weeks, the jury was instructed to compensate petitioners "for the diminution in the fair cash market value of . . . [their] lands by reason of the taking of the underground gas storage easements." (Abst. 218.) The jury awarded petitioners $75 per acre. (Abst. 40, 232.)

In making such a determination the jury was instructed not to consider the value of petitioners' land as part of an underground gas storage dome or any effect of the possibility of leakage of the gas above the top of the storage dome. (Abst. 219, 221.) These considerations were excluded by the trial court on the basis of its conclusion that under the introduced and proffered evidence the possibility of such use or such leakage was too remote and speculative to be considered by the jury.

The jury was instructed that it should consider the loss of water below the cap rock in the storage dome and that it was "not necessary for the jury to find that underground water resources be used at the time of the taking in order to be compensated therefor." (Abst. 220.) The trial court rejected the testimony of two of the three "experts" offered by petitioners on the effect of the loss of such water because they had not been shown to be qualified to express opinions on this issue. (Abst. 126-30; Add. Abst. 25-26.) Publications offered by petitioners purportedly reporting facts pertaining to this issue were rejected as incompetent to prove the facts stated therein. (Abst. 131, 212.)

The Illinois Supreme Court declined to review these instructions and evidentiary rulings on the ground that such review would merely involve the application of settled principles to the particular facts of this case. 66 Ill. App. 2d at 64, 213 N.E. 2d at 413. (Pet. A4.) The case was transferred to the Appellate Court of Illinois for the Third District which determined that such principles had been applied correctly in this case. Petitioners are now asking this Court to review the Appellate Court's decision.

Questions Presented

1. Whether the evidence introduced and proffered in this case was sufficient to show (a) a reasonable probability that petitioners' land could be used without the exercise of the power of eminent domain as an underground gas storage reservoir, or (b) a reasonable possibility that the stored gas would escape above the cap rock.

2. Whether the rejected witnesses and publications offered by petitioners on the effect of loss of the water in the storage reservoir were shown to be competent on this issue.

Argument

The only questions presented are concerned with the application of accepted principles to the particular facts of this case. Petitioners do not quarrel with the conclusion that the use of their land as an underground gas storage reservoir can be considered only if there is a reasonable possibility or probability of using their individual parcels for such purpose or combining their land with the land of others to form the dome necessary to contain the gas; nor do petitioners quarrel with the conclusion that the effect of the possibility of leakage of the gas above the dome can be considered only if there is a reasonable possibility of such leakage. (Pet. 2-3; Statement, Brief and Argument of Appellants 65.) They merely dispute the correctness of the findings of the Illinois courts that the evidence introduced and proffered was insufficient to show such possibilities.[1]

Even if the court below erred in its evaluation of such evidence or the competency of the proffered evidence relating to the loss of water in the storage dome, which it did not, such errors would not give rise to substantial constitutional questions. In *Roberts* v. *City of New York*, 295 U.S. 264, 277 (1935), this Court stated:

> "Not every such mistake amounts to a denial of constitutional immunities, though the outcome is to give the owner less than he ought to have. In condemna-

[1] We do not interpret petitioners' arguments, here or below, as involving any claim that the jury, not the judge, should have made the initial determination on the sufficiency of the evidence to show the necessary foundation for consideration of these factors. Such a claim would be frivolous. Not only is the initial determination of such matters by the judge consistent with the normal judge-jury relationship in a common law jury trial, but, "[b]y the Constitution of the United States, the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury . . . ," *Bauman* v. *Ross*, 167 U.S. 548, 593 (1897).

> tion proceedings as in lawsuits generally the Fourteenth Amendment is not a guaranty that a trial shall be devoid of error. . . . To bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action."

In an effort to overcome these deficiencies in their case, petitioners attempt to inject the question of whether the State can exclude consideration of use of their land as an underground gas storage reservoir in determining the compensation to be awarded them on the ground that the State would not permit any possible user other than respondent to develop such a reservoir. Respondent did not advance such a ground before the Appellate Court (Brief of Appellees), and, as will be shown, the Appellate Court did not rely on such a ground. In short, that question is simply not involved in this case.

1. *Exclusion of consideration of value of underground gas storage reservoir.* The Appellate Court upheld the exclusion of consideration of the value of rights under petitioners' land for the purpose of an underground gas storage on the ground that the introduced and proffered evidence was insufficient to show either a reasonable possibility that the individual parcels could have been used as storage reservoirs[2] or a reasonable possibility that petitioners' land could have been combined with the land of others to form a dome sufficient to contain the gas.

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[2] The only evidence proffered by petitioners on the use of individual parcels for underground storage concerned a reported Swedish technique utilizing high pressure water which petitioners' witness did not attempt to relate to petitioners' land. Indeed such witness did not indicate that this technique has successfully been utilized anywhere in the world. (Abst. 163, 167.) An expert offered by respondent testified that petitioners' land could not be used for underground gas storage other than in combination with the land of others to form the large storage dome which respondent is seeking to develop. (Abst. 66.)

A use of land conditioned on combining that land with the land of others can be considered in evaluating the land only if there is a reasonable probability that such combination can be effected without the exercise of the power of eminent domain. In *United States ex rel. T.V.A.* v. *Powelson,* 319 U.S. 266, 275-76 (1943), this Court stated:

> "An owner of lands sought to be condemned is entitled to their 'market value fairly determined.' *United States* v. *Miller,* 317 U.S. 369, 374. That value may reflect not only the use to which the property is presently devoted but also that use to which it may be readily converted. *Boom Co.* v. *Patterson,* 98 U.S. 403; *McCandless* v. *United States,* 298 U.S. 342. In that connection the value may be determined in light of the special or higher use of the land when combined with other parcels; it need not be measured merely by the use to which the land is or can be put as a separate tract. *McGovern* v. *New York,* 229 U.S. 363. But in order for that special adaptability to be considered, there must be a reasonable probability of the lands in question being combined with other tracts for that purpose in the reasonably near future. *Olson* v. *United States,* 292 U.S. 246, 255. In absence of such a showing, the chance of their being united for that special use is regarded 'as too remote and speculative to have any legitimate effect upon the valuation.' *McGovern* v. *New York, supra,* 229 U.S. p. 372."

Powelson was applied in the initial underground gas storage case in Illinois, *Peoples Gas Light & Coke Co.* v. *Buckles,* 24 Ill.2d 520, 534-40, 182 N.E.2d 169, 177-80, *appeal dismissed & cert. denied,* 371 U.S. 185 (Oct. Term 1962, No. 442). In the *Buckles* case consideration of the use of the land as part of an underground gas storage reservoir was rejected on the ground that there was no reasonable possibility of combining the typical farms there involved into the necessary 5,000 acre dome. This principle was reaffirmed in *Midwestern Gas Transmission Co.* v.

Mason, 31 Ill.2d 340, 342-43, 201 N.E.2d 379, 381, *appeal dismissed & cert. denied*, 380 U.S. 124 (Oct. Term 1964, No. 759). It was this principle which was applied by the Appellate Court in this case:

> "The land involved in the Petitioner's preliminary development of the project has a total area of about 5,300 acres. The parcels involved in the case before us total an area of 366.7 acres. The largest of the parcels is 120 acres in area and the largest contiguous area of any combination of the parcels is 160 acres with the smallest consisting of an area of 2 acres.
>
> * * * * *
>
> "[I]n both the Buckles and Mason cases . . . the court concluded that evidence of the value of small parcels of land for underground gas storage was too remote and speculative to be admitted or considered. . . . An examination of such cases and the facts and circumstances in the present case furnishes, we believe, no reasonable basis for overruling or distinguishing the principles announced in both the Buckles and Mason cases and we, therefore, believe that the Trial Court properly determined that evidence of the value of the parcels for underground gas storage was too remote and speculative to be admissible, particularly in view of the fact that there was no basis in the evidence to show that there was a reasonable possibility that the small parcels could be used as individual underground gas storage projects." 66 Ill. App. 2d at 67, 72-73, 213 N.E.2d at 414, 417. (Pet. A7, A18-19.)

Petitioners do not dispute the fact that the absence of a reasonable probability of combination prevents consideration of a combined use. They contend, however, that the Appellate Court upheld the exclusion of consideration of the use of their land as part of a storage reservoir on the ground that the State would not authorize anyone other than the respondent to develop the reservoir. This contention is based on the fact that such a rationale was

used as an alternative or cumulative reason for the exclusion of consideration of such use in the *Buckles* case, 24 Ill.2d at 534-40, 182 N.E.2d at 177-80, and the *Buckles* case was cited favorably in this case. At most, this suggests that such rationale was an alternative ground in the instant case. However, as shown by the above quote, the Appellate Court in this case did not rely on this rationale but instead relied on the impossibility of combination rationale of *Buckles*, as urged by respondent (Brief of Appellees 20). The inability to use the individual parcels as storage reservoirs and the relationship of the individual parcels to the total area needed to form the dome, the facts on which the Appellate Court based its decision, are relevant only to the impossibility of combination theory. In either event, any consideration of the effect to be given respondent's certificate from the State to develop the dome would be academic in this case.[3] Cf., *e.g.*, *Lynch* v. *New York ex rel. Pierson*, 293 U.S. 52 (1934).

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[3] Parenthetically, it appears that this Court's exclusion in *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1956), of consideration of use of land as a dam site in determining compensation on the ground that such use was subject to the consent of the United States, would support the exclusion here of consideration of use as a storage reservoir on the ground that such use was subject to the consent of the State. Certainly there is no basis for petitioners' assertion that *Grand River Dam Authority* v. *Grand-Hydro*, 335 U.S. 359 (1948), is to the contrary. There the question was "whether the Federal Power Act had so affected the use or value of certain land for power site purposes as to render inadmissible expert testimony which gave recognition to that land's availability for a power site," and this Court simply held that "there is nothing in the Federal Power Act to indicate that an attempt has been made by Congress to make such a nationwide change in state laws." 335 U.S. at 361, 374. Implicit within this holding is the assumption that Congress could constitutionally prevent the consideration of such use. The Oklahoma court, in holding that the State of Oklahoma could not prevent such consideration, relied solely on that State's constitution. 335 U.S. at 371.

2. *Exclusion of consideration of effect of possibility of leakage.* Such consideration was excluded because the evidence introduced and proffered was insufficient to show a reasonable possibility that the gas would escape above the cap rock. Petitioners admit that the possibility of leakage must be reasonable before the effect of such a possibility can be considered. (Statement, Brief and Argument of Appellants 65.) They contend, however, that the Appellate Court improperly deferred to the previous finding of the Illinois Commerce Commission on this issue. (Pet. 27-28.) This is simply not true. The Appellate Court upheld the exclusion of consideration of this factor on the basis of its independent evaluation of the introduced and proffered evidence. The opinion of the Appellate Court states:

> "One of the Defendants' two technical witnesses expressed no opinion on the likelihood of gas leakage above the Maquoketa. The other witness who did assert that it would not be an impermeable caprock stated that he had not examined the cores taken from the Maquoketa in the Crescent City Field and admitted that he had previously testified in the Commerce Commission proceeding to the effect that he would not expect the gas to get through that shale to the surface as he felt it was a good tight rock. [Abst. 121-22; Add. Abst. 24-25.] Evidence concerning other unrelated gas storage projects, where no degree of similarity is shown, would not have been proper. It was indicated by the expert witnesses that each of the storage projects must be studied on its own merits and that caprock properties are not necessarily uniform from one aquifer project to another. [Add. Abst. 7, 24, 27.]" 66 Ill. App. 2d at 73-74, 213 N.E.2d at 418. (Pet. A14.)

As the Appellate Court pointed out, petitioners' present inability to show a reasonable possibility of leakage would not prejudice them in the future if such leakage does occur.

"It is axiomatic that if leakage does in fact occur in the future which causes damage outside the easement area, nothing in this proceeding would preclude recovery for such damage if the action for recovery is otherwise on a sound basis authorizing recovery." 66 Ill. App.2d at 77, 213 N.E. 2d at 419-20. (Pet. A18.)

3. *Rejection of unqualified experts on use of water below cap rock for irrigation.* Contrary to the suggestion of petitioners (Pet. 29), the issue of the effect of the loss of water below the cap rock upon present and future uses of petitioners' land was submitted to the jury and the jury's award of $75 per acre presumably was based on the effect of such loss. Petitioners' valuation experts were permitted to take this factor into consideration in estimating the damages that would be sustained by petitioners. (Abst. 200, 202-03, 206-07.) Petitioners and another farmer were permitted to testify about the possibilities of irrigation. (Abst. 123, 175-76, 194-95.) Contrary to the statement by petitioners (Pet. 13-15), their witness Bays was permitted to testify about the supply of water above the cap rock and the amount of water needed for irrigation. (Abst. 158-60.) (An objection was sustained to his repetitive conclusion that the water supply above the cap rock would not support irrigation.) Two other experts offered by petitioners (Hoekstra and Smith) were not permitted to testify simply because they had not been shown to be qualified on this issue. As pointed out by the Appellate Court:

> "The witness [Hoekstra] had testified that he was a vegetable and grain farmer and irrigates his farm and there was no evidence as to the similarity of the particular land to farms which the witness had seen which might have been irrigated or to his own farm nor was he an expert on irrigation in any respect.

[Add. Abst. 26; Abst. 127-30.] Similarly, another witness [Smith] who was asked his opinion as to the adequacy of the glacial drift water supply to support irrigation, had indicated that he had made no specific studies of ground water reserves in the county. [Add. Abst. 25; Abst. 126-27.]'' 66 Ill. App.2d at 75, 213 N.E. 2d at 418 (Pet. A16.)

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 29, 1966

Signed Copy

No. 317.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

NORTHERN ILLINOIS GAS COMPANY, a Corporation,
Plaintiff-Respondent,

vs.

JOHANNAH H. WIENRANK, DONALD R. WIENRANK, ANNABELL WIENRANK, CLARA CANADY, HERBERT E. MYERS, GOLDIE H. CENTER, WENDELL F. CENTER, CHRISTINE LIETZ, EDWARD LIETZ, MATHILDA ASH, JOHN J. ASH, JOHN C. WIENRANK, ELSIE WIENRANK, JOHN ASH, JERRY ASH, DONALD R. WIENRANK, as Executor of the Estate of Christ J. Wienrank, Deceased,
Defendants-Petitioners.

REPLY BRIEF OF PETITIONERS.

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Defendants-Petitioners.

REPLY BRIEF OF PETITIONERS.

We regret the necessity of filing a Reply Brief, particularly in view of the length of our original Petition. It is popularly believed by lawyers that a petition for writ of certiorari will not be read if it exceeds 18 pages in length, which ours does. As Abraham Lincoln is said to have stated, a man's legs should be long enough to reach to the ground—and our Petition could not have been

shortened and still presented the constitutional deprivations that occurred. It is incredible to suppose that controversies are accepted by this Court by word count instead of the significance of the matters at issue.

One of the cardinal rules of brief-writing is to speak softly, to understate rather than to declaim, and not to voice indignation even when it reaches the boiling point. However, one thing which this Court is entitled to expect from lawyers admitted to practice before the highest court in the land is integrity. The inversion of terms or use of words to mislead demean not only the Bar but the Court itself, and should not be accepted as true nor escape this Court's attention.

The respondent's brief, for the purpose of making it appear that the "single-user" rule was not presented to the State courts, declares (Respondent's Brief, p. 5):

> "In an effort to overcome these deficiencies in their case, petitioners attempt to inject the question of whether the State can exclude consideration of use of their land as an underground gas storage reservoir in determining the compensation to be awarded them on the ground that the State would not permit any possible user other than respondent to develop such a reservoir. Respondent did not advance such a ground before the Appellate Court (Brief of Appellees), and, as will be shown, the Appellate Court did not rely on such a ground. In short, that question is simply not involved in this case."

The landowners are the petitioners in this Court; they were the defendants in the state court. The question is not what the utility company argued in the state court but the issues presented by the landowners. As pointed out in the Petition for Writ of Certiorari (pp. 4-9, 25, 26, 29, 31), this question was squarely presented to the trial court and ruled upon by the trial court (Abst. 107, 111, 112) which

held explicitly that since Northern Illinois Gas had received a permit to store gas in that area, the trial court would receive no evidence relating to value of such gas storage although there was an active competitive market in existence. We claimed then, and claim now, that such ruling deprived us of due property without due process.[1]

In the state court appeal, it is true that the respondent (Northern Illinois Gas Company) attempted to dodge this issue; it did (Appellee's Brief, p. 20) rely expressly on *Buckles* and *Mason* to circumvent this point.

Let us clarify any confusion which may exist. No briefs were filed in the Illinois Appellate Court. The appeal, because of the constitutional questions, went directly to the Supreme Court of Illinois in which all briefs were filed. That Court, because of *Buckles* and *Mason*, refused to consider the constitutional issues and transferred the case to the Appellate Court. That Court stated, in part (66 Ill. App. 2d 60 at 72):

> "In the scholarly brief presented by Defendants it is suggested that this court overrule the Buckles and Mason decisions at least as applied to the facts before us in the instant case."

And, at page 78, that court stated that the decisions above cited: "are precedents which are directly applicable to the cause before us."

To show further that respondent utility company's assertion that landowners now "attempt to inject the ques-

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[1] As to the citation of Bauman v. Ross, 167 U. S. 548, cited in footnote 1 by the respondent, we direct this Court's attention to **Constitution of the United States of America**, published by the Library of Congress, p. 872 which cites such decision for the following proposition: "Where property is taken by the United States in the exercise of the power of eminent domain, but without condemnation proceedings, the owner may, under the Tucker Act, bring suit for just compensation in the Court of Claims or in a district court sitting as a Court of Claims."

tion" is inaccurate, we are herewith filing and have sent to the Clerk of this Court ten copies of our brief in the Illinois Supreme Court, so that they will be readily available for examination by this Court. One copy thereof has already been certified by the respondent, so that identity of such briefs is not a question. The contentions we advance here were propounded in the state court in even more elaborate detail (pp. 2-8, 23-58).

The respondent then says (p. 5): "In short, that question is simply not involved in this case."

Such misstatements to this Court are unworthy of able lawyers. However great their success may be in a metropolitan area, their duty to a tribunal before which they appear never alters. They are officers of the court and owe a duty of fidelity to it. Accordingly, I apologize for my brothers who oppose me in this case and ask this Court to consider the contentions as shown by the Abstract, by the Petition, and by the briefs in the state court —all of which have been filed herein.

We find a somewhat similar approach in footnote 2 on that same page of respondent's brief. It states that: "An expert offered by respondent testified that petitioners' land could not be used for underground gas storage other than in combination with the land of others to form the large storage dome which respondent is seeking to develop."

However, when the landowners offered expert testimony as to the same matter, such testimony was excluded (Abst. 163). In the trial court, there was a strange type of unilateral proof—all evidence offered by the utility company was received; evidence to the contrary, offered by the landowners, by equally as well-qualified witnesses, was excluded. Almost all of the evidence upon the issues had to be made by offers of proof to protect the record.

At another place (p. 6), the respondent states that the pertinent issue in *Buckles* rests upon the *Powelson* case. This is in error. We have no quarrel with that aspect of *Powelson*—and, had the trial court followed *Powelson*, it would have received the expert testimony of Dr. Carl A. Sherman (Abst. 112, 113) and of Dr. Carl A. Bays (Abst. 162, 163) as to the reasonable probability of the lands being considered with other tracts for gas storage.[2] *Buckles*, for the first time, announced a new rule—and that was that such combination could not be considered because it, the State, had licensed a specific utility company to take advantage of such use—hence all evidence of value therefor became irrelevant. And, in reaching that startling conclusion, *Buckles* did not rely on *Powelson* (see Appendix to Petition, p. 21). It cited only one decision, which had nothing to do with that issue, namely, United States v. Virginia Electric & Power Co., 365 U. S. 624. That case dealt solely with the matter of navigational servitude.

It is interesting to note that in respondent's footnote 3 (p. 8 of Respondent's Brief), it falls into precisely the same error. In relying upon United States v. Twin City Power Co., 350 U. S. 222, respondent fails to recognize that such decision turns on exactly the same point of navigational rights, this Court stating at 224, 225, 227, 228:

> "The interest of the United States in the flow of a navigable stream originates in the Commerce Clause. That Clause speaks in terms of power, not of property. But the power is a dominant one which can be asserted to the exclusion of any competing or conflicting one. The power is a privilege which we have called 'a dominant servitude' (citing cases) or 'a superior navigational easement.' * * * We deal here with the fed-

[2] *Powelson* points out, incidentally, at page 283 that the United States need only pay for property taken, whereas a state or one licensed by the state must pay for damage to or diminution in value as well as for that which is taken.

eral domain, an area which Congress can completely pre-empt, leaving no vested private claims that constitute 'private property' within the meaning of the Fifth Amendment. * * * What the Government can grant or withhold and exploit for its own benefit has a value that is peculiar to it and that no other user enjoys."

Accordingly, that citation is no more relevant than the *Virginia Electric* case. The latter was cited by the utility company in *Buckles* to confuse the Illinois courts and and succeeded in doing so. It is strangely disrespectful to cite to this Court one of its own decisions in an effort to confuse it. Respondent also fails in its analysis of *Grand-Hydro* to distinguish between situations where the United States is the taker (holding control of the navigable waters) and the situation where a state, state agency, or private corporation seeks to take the property of another. In all events, as repeatedly stated, we are not here concerned with navigable waters but with the value of subsurface property rights for which there is an existing market but as to the existence of which value all evidence was excluded.

The respondent asserts that the Illinois court did not mean what it said in *Buckles* and *Mason*. At one point, it is stated that the above matter was merely an "alternative" basis for decision in *Buckles*. Even if this were accurate, such is immaterial when the trial court followed such reasoning to exclude all evidence presented by the landowners on this ground (Abst. 107, 111, 112). This court has the power, if any ambiguity exists, to remand this case to the Illinois courts for clarification of this matter, Mental Hygiene Department v. Kirchner, 380 U. S. 194. However, it is immaterial what was said in *Buckles* or *Mason*. What matters here is the construction which the trial court placed upon the language of the *Buckles* case and its rulings in excluding all proper testimony and in denying all offers of proof relative to value, feasibility of

combination of interests, potentiality of irrigation and the effect of the destruction of water resources thereon, and damage caused to market value from the reasonable fears of fires and explosions. The constitutional deprivation occurred in the trial court, and the reviewing courts of Illinois expressly approved what it had done. As we stated earlier, property rights were once considered as important as civil rights—although at least one writer, as well as the respondent, seems to believe that property rights are disappearing with the blessing of this Court, Schwartz, Bernard, *A Commentary on the Constitution of the United States,* 1965, MacMillan, Part II, "The Right of Property," Volume III, p. 233.

A court of much lesser statute than this Court pointed out in Robertson v. City of Sullivan, D. C. Ore. 1961, 191 F. Supp 604, that an ordinance was invalid which zoned an area of land so as to prohibit commercial development although it was located within a commercial area—such zoning having occurred at the request of the State of Oregon, so as to hold down the cost of acquiring land for state office buildings. So it is here. A state may, under its police powers, acquire property. Likewise, it may invest others with this power—**but not without full and fair payment.** And that payment must embrace the fair cash market value of every facet of that of which the owner is deprived. The "single purpose" and "single bidder" rules which were adopted by the trial court manifestly are inconsistent with the constitutional guarantees conferred upon citizens. The very fact that the plaintiff utility company sought and received a "perpetual *assignable* easement" is a recognition that companies or persons other than the plaintiff alone were or reasonably could be interested in the property as such. The jury was not permitted to hear any testimony upon the areas covered by our offers of proof in better arriving at the value of that which was taken. We do not say that the jury had to

accept either our theory or the figures of our experts. But we do say that no State can, by certificating a utility company, destroy the concept of marketability which is the conventional test in eminent domain, nor preclude the consideration of any factor which enters into the question of value. A jury may accept or reject any theory or any body of evidence proffered, provided its action is not capricious. But it has a right to hear the testimony, or the constitutional right of jury trial in condemnation cases has ended.

Let us be sure that we understand each other upon this point—that we are talking the same language. Of course, a certificate can be issued to a single utility company for almost any type of franchise. That is not the question. By doing so, however, the State cannot say: "there is no longer a competitive market, so that any figure named by the utility company or by its witnesses must control." If, under free and competitive bidding, numerous buyers would find the property desirable and bid against each other to secure it, the highest price which would be paid by such willing buyer, plus the damages to the remaining property, remains the criterion of value. Otherwise, the State has knocked the stuffings out of value and permitted a taking without compensating the owner for the property's true worth.

Obviously, the favored utility company can dispute our assertions in court. It may bring forward evidence to attempt to prove that the property is inherently valueless or that others would pay only a nominal price for it. But it cannot prevent, nor can a trial court prevent, the reception of evidence to show the value of the thing taken for its highest and best use, if it is of intrinsic value to many possible buyers, and not to the respondent alone—or the test of eminent domain becomes a sham. The sacred promises of constitutional guarantees become parrot phrases uttered by black-robed men which are utterly

meaningless to protect the rights they were drafted to preserve.

There can be no doubt but that Dr. Bell, Dr. Bays, Dr. Bretz, Harmon Smith, Sylvester Beaupre, Harold Sense, and the other persons of expert qualifications whom we proffered—and whose testimony was preserved by proper offers of proof—could greatly have assisted the jury in its consideration of the questions of property uses and property values. Perhaps the jury would not have accepted their testimony, particularly if vigorously cross-examined by able counsel. But at least it has the right to be informed upon the subject so that it may make the determination of these important factual issues. A trial limited to the theory and evidence of one side is no trial at all.

The trial court cannot be subjected to too much criticism for his rulings in this case. He had no choice but to follow the *Buckles'* decision—and that decision was clearly wrong. *Buckles* cited no authority for its support except one navigational servitude decision, which had no place in such consideration. Apparently the Court's attention in *Buckles* had not been called to Grand River Dam Authority v. Grand-Hydro, 335 U. S. 359, since it makes no reference to that decision. They are diametrically opposed to each other; and if *Grand-Hydro* was correct, then *Buckles* was wrong and the trial court in this case was wrong. No person other than an academician adroit enough to select the number of angels who can stand on the head of a pin could find a distinction between the two cases. Cuteness and niceties have no place in jurisprudence when a battering ram has been used to overthrow a controlling precedent laying down the only possible result consistent with constitutional principles.

The respondent utility company states that the landowners have been adequately compensated at the rate of

approximately $75 per acre for the loss of rights which they were not presently utilizing. If those rights were, in fact, worth $1,000 an acre, then such a statement is absurd. And no person can determine the matter of value except a jury which has been permitted to consider the existence of a competitive market (if one does exist, and testimony was offered to that effect) and the values possessed upon such market. Again, one is not limited to present uses, but the jury may consider the total of concurrent uses to which the property is reasonably susceptible of being adapted. I may have oil under my land, but prefer to wait until my declining years to commercialize it, or leave it in place for my children. However, another cannot deprive me of that property without adequate payment. So far as irrigation is concerned, the offers of proof show that irrigation is going on in numerous places in that immediate area as shown by witnesses Cultra and Hoekstra; further, at least two of these landowners had secured deep-well permits for this purpose. Under this Court's decision in *McCandless,* this evidence should have been received. And, finally, what shrinkage occurs to value when one sits over a powderkeg? After being familiarized with the facts of the fires and explosions in other underground gas storage projects of which the photographs in the Abstract are representative (Abst. 183, 195), and the destruction of glacial drift water wells in those areas, many would not purchase such lands at any price. The testimony of realtors as to the effect of these factors upon the fair cash market value of these lands again was excluded.

As to the other points discussed by respondent, no reply is required. The Petition amply covers those points and demonstrates the inaccuracy of the generalities in respondent's brief.

I do not ask that this Court be joyous concerning the bluntness of my expressions either in the original petition

or in this brief. But no lawyer, if he possesses integrity, can be so gutless as to be a gentleman first and an advocate second. Censure me if you like, but hear this case. For when you do, you will reverse it.

Respectfully submitted,

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Defendants-Petitioners, by

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